Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

JOE B. RITCHEY,

Petitioner,

v.

UPJOHN COMPANY and WILLIAM DEMENT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the one year limitation on diversity removal under the 1988 amendments to 28 U.S.C. § 1446(b) absolutely preclude removal in *all* diversity cases after the limitation period expires, and if not, does the one year limitation period on removal only begin to run from the date when the action stated by the initial pleading setting forth the claim for relief filed in state court was served on the diverse state court defendant, who then filed notice of removal more than two years beyond the filing of the original action in state court?

2. Does removal of a case by a diverse defendant under 28 U.S.C. § 1446(b) on grounds of fraudulent joinder based on the bald and frivolous claim that plaintiff could not possibly prevail in state court under state law against non-diverse defendants, unconstitutionally vest the judicial power in the United States courts beyond Article III, Section 2 of the United States Constitution when any alleged pleading deficiences could have been readily cured by amendment to the original state court complaint which had not even once yet been amended in state court?

3. Is a diversity case removable under 28 U.S.C. § 1446(b) on grounds of alleged fraudulent joinder of nondiverse parties where the district court found, in the absence of any discovery and in the face of comprehensive and detailed countervailing declaration, that the pro se plaintiff could not possibly prevail against a statute of limitations and res judicata defense for state law common law fraudulent concealment, deceit and conspiracy by a

QUESTIONS PRESENTED FOR REVIEW – Continued

pharmaceutical manufacturer and its so-called independent FDA advisors who allegedly, for payments from Upjohn of more than $2,000,000 per year, concealed research from and misled the Food and Drug Administration to prevent the timely discovery of the cause of injury and causes of action by the petitioner – even though the offered new and independent State resident actions tolled the statutes of limitations under California law and the state law conspiracy was only discovered by the plaintiff less than 6 months before the filing of this action in state court.

THE PARTIES TO THE PROCEEDINGS

Petitioner is Joe B. Ritchey, a pro se plaintiff in the United States District Court for the Northern District of California, and a pro se appellant in the United States Court of Appeals for the Ninth Circuit. Defendants and Respondents are The Upjohn Drug Company ("Upjohn"), Dr. William Dement ("Dement") a California state resident and another state resident served as John Doe defendant, the Sleep Disorders Clinic.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 4

Procedural History 4

Statement of Facts 6

Jurisdiction in District Court 9

REASONS FOR GRANTING CERTIORARI 9

1. The Court Should Grant Review In This Case To Resolve The Uncertainty Regarding The Interpretation Of The One-Year Limitation On Diversity Removal Under The 1988 Amendments to 28 U.S.C. § 1446(b) 9

2. Review By This Court Is Necessary To Decide An Important Question Of Federal Jurisdiction Given The Circuits And District Courts' Lack Of A Clear And Unambiguous Position Regarding The Nature And Extent Of the Power Of The Federal Courts Under Article III, Section 2 Of The Constitution And The 1988 Amendments to 28 U.S.C. § 1446(b) To Examine The Merits Of Claims Arising Solely Under State Law Brought In State Court Against Non-Diverse State Court Defendants 13

CONCLUSION 24

TABLE OF AUTHORITIES

Page

(PRO FORMA)

CASES

AIDS Counseling and Testing Centers v. Group W Television, Inc., 903 F.2d 1000 (10th Cir. 1990)..... 18

Allied Equipment Corp. v. Litton Saudi Arabia Corp., 7 Cal. 4th 503 (1994) 13

Angel v. Bullington, 330 U.S. 183 (1947)..... 15

B., Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981)..... 17

Batoff v. State Farm Insurance Company, 977 F.2d 848 (3d Cir. 1992) 17

Beisel v. Aid Ass'n for Lutherans, 843 F. Supp. 616 (C.D. Cal. 1994) 10

Boyer v. Snap-on Tools Corp., 913 F.2d 108 (3rd Cir. 1990)..... 17, 21

Bristol-Meyers Squibb Co. v. Superior Court (1995), 32 C.A. 4th 959 20

Carlin v. Superior Court of Sutter County, 13 Cal. 4th 1104, 920 P.2d 1347 (1996), 56 Cal. Rptr. 2d 162 20

Caterpillar, Inc. v. Lewis, 519 U.S. 61, 117 S.Ct. 467 (1996)..... 5, 11, 12

Chesapeake & O. R. Co. v. Cockrell, 232 U.S. 146 (1914)..... 16, 21

Chicago, R. I. & P. R. Co. v. Dowell, 229 U.S. 102 (1913) 16

Dodson v. Spiliada Maritime Corp., 951 F.2d 40 (5th Cir. 1992) 17

TABLE OF AUTHORITIES – Continued

Page

Green Point Sav. Bank v. Cortez, 104 F.3d 351 (Table), 1996 WL 549729 (2nd Cir. 1996)..... 12

Green Point Savings Bank v. Hidalgo, 910 F. Supp. 89 (E.D.N.Y.1995)..... 12

Hackethall v. National Casualty Company, 189 Cal. App. 3d 1102 (1987)..... 13

Hom. v. Service Merchandise Co., Inc., 727 F. Supp. 1343 (N.D. Cal. 1990)..... 11

Illinois Cent. R. Co. of State of Illinois v. Sheegog, 215 U.S. 308 (1909)..... 16

In re Uniroyal Goodrich Tire Co., 104 F.3d 322 (11th Cir. 1997)..... 11

Kinabrew v. Emco-Wheaton, Inc., 936 F. Supp. 351 (M.D. La. 1996)..... 10

Lobato v. Pay Less Drug Store, Inc., 261 F.2d 406 (10th Cir. 1958)..... 18

Lucas v County of Los Angeles, 47 C.A. 4th 277 (July 1996)..... 21

Molko v. Holy Spirit Association, 46 Cal. 3d 1092 (1988)..... 14

Neitzke v. Williams, 490 U.S. 319 (1989)..... 17

Newman v. Brent, 1998 Dist. Lexis 10476 (D.D.C. July 8, 1998)..... 11

New York Life Ins. Co. v. Deshotel, 142 F.3d 873 (5th Cir. 1998)..... 10

Norgart v. Upjohn Co., 64 Cal. App. 4th 192 (1998), 74 Cal. Rptr. 2d 807..... 20

TABLE OF AUTHORITIES – Continued

Page

O'Brien v. Powerforce, Inc., 939 F. Supp. 774 (D. Haw. 1996) 10

Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459 (2d Cir. 1998) 19

Perez v. General Packer, Inc., 790 F. Supp. 1464 (C.D. Cal. 1992) 11

Powers v. Chesapeake & O. Ry. Co., 169 U.S. 92 (1898) 15

Pullman Co. v. Jenkins, 305 U.S. 534 (1939) 16

Rashid v. Scenck Construction Co., 843 F. Supp. 1081 (S.D. W.Va. 1993) 10

Rezendes v. Dow Corning Corp., 717 F. Supp. 1435 (E.D. Cal. 1989) 11

Ritchey v. Upjohn Drug Co., 139 F.3d 1313 (9th Cir. 1998) 1, 4, 13, 19, 20, 23

Ritchey v. Upjohn Drug Co., No. 94-15171 (9th Cir. 1995) (unpublished disposition) 8, 20

Singh v. Daimler-Benz AG, 9 F.3d 303 (3d Cir. 1993) 11

Smoot v. Chicago, Rock Island & Pac. R.R. Co., 378 F.2d 879 (10th Cir. 1967) 18

Stevens v. Superior Court, 180 Cal. App. 3d 605 (1986) 13

Wilson v. Kepublic Iron & Steel Co., 257 U.S. 92 (1921) 15, 16

Wyatt v. Union Mortgage Co., 24 Cal. 3d 773 (1979) 13

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

United States Constitution, Article III, Section 2 1

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1332(a) 1, 9, 23

28 U.S.C. § 1441 2

28 U.S.C. § 1441(a) 2, 9

28 U.S.C. § 1446 2

28 U.S.C. § 1446(b) ..... *passim*

28 U.S.C. § 1447 3

28 U.S.C. § 1447(d) 12

28 U.S.C. § 1915(d) 18

California Civil Code § 430.10(f) 19

RULES

Fed. R. Civ. Proc. 12(b)(6) 5, 17, 18, 21, 22

Fed. R. Civ. Proc. 56(c) 18

MISCELLANEOUS

Archibald, *Reintroducing "Fraud" to the Doctrine of Fraudulent Joinder*, 78 Va. L. Rev. 1377 (1992) 14

Catz & Guyer, *Federal In Forma Pauperis Litigation: In Search of Judicial Standards*, 31 Rutgers L. Rev. 655 (1978) 18

TABLE OF AUTHORITIES – Continued

Page

Commentary on 1988 Revision of Section 1446 in the United States Code Annotated (West, 1997) 11

H.R. Rep. No. 889, 100th Cong., 2d Sess., at 71-73 (1988) reprinted in 1988 U.S.C.C.A.N 5982, 6031-34.8 11

OPINIONS BELOW

The District Court entered its Order Granting Defendants' Motions to Dismiss and its Order Denying Plaintiff's Motion to Remand on September 9, 1996. (App. 25). The opinion of the Ninth Circuit affirming these orders is reported as *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998) (App. 1).

JURISDICTION

The final judgment of the Court of Appeals for the Ninth Circuit was entered on April 3, 1998. On May 27, 1998, that court denied Petitioner's timely petition for rehearing with suggestion for rehearing en banc. (App. 36). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This timely petition was filed within 90 days of the denial of rehearing with suggestion for rehearing en banc.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Article III, Section 2 provides in relevant part:

The judicial power shall extend to. . . . Controversies between Citizens of Different States

2. 28 U.S.C. § 1332

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy

exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different States.

3. 28 U.S.C. § 1441

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

4. 28 U.S.C. § 1446

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court

and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

5. 28 U.S.C. § 1447

A motion to remand the case on the basis of any defect other than subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

STATEMENT

Procedural History

On January 3, 1994 petitioner Joe B. Ritchey brought this pro se action against the Upjohn Company, Dr. William Dement, Sleep Disorders Center and other Doe defendants in the California Superior Court for Santa Cruz County. Process was served on Upjohn by their agents, co-conspirators and co-defendants on Wednesday, December 27, 1995. On Monday, January 29, 1996, more than two years after the action was filed in state court and more than 33 days after receipt by agents of Upjohn of the copy of the initial pleading setting forth the claim for relief under 28 U.S.C. § 1446(b)(1), Upjohn, a non-California corporation, removed the case to the United States District Court for the Northern District of California although the other co-defendants were California residents.[1] Upjohn claimed there was complete diversity of

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[1] The statute provides that "notice of removal *shall* be filed within thirty days." (Emphasis added). Curiously, the court of appeals held that petitioner "waived that issue when he failed to raise it within 30 days after removal" in the district court, and "did not raise the issue before us until his reply brief." 139 F.3d 1313, 1315 fn.3 (9th Cir. 1998). Upjohn's inexplicable failure to file a timely notice of removal within 30 days is jurisdictional, cannot be waived by the parties, and can be raised by a party at any time including a reply brief on appeal and in this petition for writ of certiorari. Petitioner now asserts before this Court that the order of the district court granting removal and awarding summary judgment to the respondents is void for want of subject matter jurisdiction. Accordingly, this Court should grant certiorari and vacate the district court's final judgment on the merits with directions that Upjohn's untimely notice of removal be dismissed for want of subject matter

citizenship, asserting that Dement, Sleep Disorders Center and the other state Doe defendants were sham defendants because they could rely upon the state law defenses of the statute of limitations and res judicata.

Pro se plaintiff moved to remand, pointing out that the California defendants destroyed complete diversity, and that Upjohn's notice of removal came more than two years after the action was filed in state court for acts of fraud and conspiracy that were not discovered by petitioner until six months before this state court action was filed on January 3, 1994. The district court denied the motion to remand, and granted the Fed. R. 12(b)(6) motions as to all the defendants on grounds of the state statute of limitations and res judicata. On May 3, 1996 at a hearing on defendants' motion to dismiss and plaintiff's motion to remand the following instructive remarks were made in open court by the district judge.

The Court:

> Basically, I think this case presents one issue that's difficult, and that is what the last clause in 1446(b) means, and obviously there are cases going both ways with the majority of the cases in favor of Mr. Ritchey's position. However, I

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jurisdiction, with the case remanded back to the Superior Court in and for the County of Santa Cruz, California. *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 S.Ct. 467, 472 (1996). (Failure by state court plaintiff to file motion to remand within 30 days is mandatory, but defects that go to subject matter jurisdiction can be raised at any time). Upjohn's notice of removal which *shall be* filed in thirty days is untimely and any subsequent action taken by the district court other than an order of remand is void for want of subject matter jurisdiction.

> must say that I find the reasoning of the *Zogbi* case, and I recognize that there's even a case in that district later than *Zogbi* that goes the other way, more persuasive because it seems to me that reading it the way that a number of cases have done, including a couple from this district, *really is just nonsensical.* Frankly, and I might as well be totally up front with you Mr. Ritchey, I just, *while this case goes forward in state court, I just don't think there's a chance that it's going to go forward here. The statute of limitations was determined against you and went up on appeal and you lost.* (Emphasis added). (App. 65)

The Ninth Circuit affirmed, ruling that the one-year time period within which removal must be effected under § 1446(b) did not apply, and mistakenly concluded with no support in the district court record that the California defendants were fraudulently joined because the limitations period had run before Petitioner filed his complaint. Thus, according to the Ninth Circuit, diversity was complete simply by claiming without more that the California defendants, like Upjohn, could assert that under California law no cause of action was stated against them. Neither the District Court nor the Ninth Circuit would consider Petitioner's opposing declarations, detailed offered evidence in opposition and amendments that would have cured any pleading defects.

Statement of Facts

In 1983 and thereafter, Petitioner was taking a now banned dosage of Halcion, a drug manufactured by Upjohn, which caused him to suffer a number of side

effects. The side effects caused numerous serious damages, including Petitioner's conviction on criminal offenses which in 1991 State Bar Proceedings, the California Supreme Court unanimously agreed had been solely caused by Upjohn's product. In the First Cause of Action in his Complaint in this matter, Petitioner alleged that

> Upjohn, Dement, various of its employees, agents and directors and "independent researchers and clinicians" . . . joined . . . to defraud and deceive the Food and Drug Administration and the consuming public, by submitting incomplete, misleading, and false data in violation of the Federal Food, Drug and Cosmetic Act." App. 37.

In his Second Cause of Action, Petitioner further alleged:

> Defendants, the Upjohn Company, William Dement and Does 1 through 10, composing employees, agents, consultants, investigators, and attorneys, commenced a conspiracy and concert of action wherein each said party acted as a conspirator and/or co-conspirator within the course and scope of said conspiracy. App. 48.

The Second Cause of Action also alleged the object of the conspiracy was to "misrepresent the true nature, dangers, hazards, and risks associated with the drug Halcion. . . . " and that defendants acted "in concert" in furtherance of the conspiracy "to hinder the submission of full, complete and unbiased information to the FDA, to misreport protocol results, to select biased and favorable

investigators, to suppress the dissemination of information reasonably disclosing the risks, hazards, and consequences of the usage of Halcion. . . . " App. 48.

The Complaint also alleges as to both Causes of Action that Defendants "have striven to conceal their civil and criminal liability and illegal acts under various federal statutes and promulgated regulations and Plaintiff has just discovered *a portion* of them within the last 18 months . . . " (App. 39).

In March of 1990, Petitioner had previously sued Upjohn alone, alleging in California State Judicial Council form complaint that Upjohn's product Halcion was defective, and that he had taken it with resulting injuries (Ritchey I). In October of 1993, the United States District Court granted summary judgment against Petitioner in that case, on the sole ground that California's one-year statute of limitations for personal injury actions had run before he sued. The dismissal was affirmed by the Ninth Circuit on June 6, 1995. See *Ritchey v. Upjohn Drug Co.*, No. 94-15171 (9th Cir. 1995) (unpublished disposition). (App. 53).

In *Ritchey I*, the Ninth Circuit held that Petitioner's suit for personal injuries was barred by California's one-year statute of limitations, because he had " 'notice or information of circumstances to put a reasonable person on inquiry' over one year before filing" that action; i.e., as early as August of 1988 and no later than March of 1989. (App. 55). However, neither Dement, Sleep Disorder Center nor other subsequently discovered defendants named in this case filed on January 3, 1994 in the California superior court were known to the plaintiff nor named in

Ritchey I, nor had there been any ruling on Petitioner's newly pled facts which would under state law toll the statute of limitations, that those newly discovered defendants had engaged in a conspiracy with Upjohn to conceal the truth about Halcion in order to defraud Petitioner, the public and the FDA. See Omnibus Declaration and offered facts of Joe Ritchey in Support of Petition for Remand. (App. 68 & 74).

Jurisdiction in District Court

If the district court had jurisdiction, it was pursuant to 28 U.S.C. § 1332(a) on the theory that this was a diversity action, which was removed pursuant to 28 U.S.C. § 1441(a). However, it was and is Petitioner's position that because the other served defendants were newly discovered and identified California domiciliaries, complete diversity is defeated and the federal court lacks subject matter jurisdiction.

This petition for writ of certiorari squarely presents core and fundamental questions regarding subject matter jurisdiction and the scope of diversity removal.

REASONS FOR GRANTING CERTIORARI

1. The Court Should Grant Review In This Case To Resolve The Uncertainty Regarding The Interpretation Of The One-Year Limitation On Diversity Removal Under The 1988 Amendments to 28 U.S.C. § 1446(b)

Petitioner's motion to remand was based in part on 28 U.S.C. § 1446(b), which provides:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

It was, and is, Petitioner's view that the Section 1332 diversity removal of this action was absolutely precluded by § 1446(b), because the action had been pending in state court for more than one year at the time the removal notice was filed. However, the Ninth Circuit ruled that the one-year time limit applies only "to the antecedent clause to which it is attached, and not to other paragraphs or sentences in the statute." (App. 7). And because the action was removable, if at all, at the time it was originally filed, the circuit court held that the one-year time limit did not apply. *Id.*

This approach is similar to that adopted by the Fifth Circuit in *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873 (5th Cir. 1998). However, as the Ninth Circuit acknowledged, a number of district courts have disagreed with this view, holding that the last clause of § 1446(b) must be construed strictly to mean exactly what it says. See *Kinabrew v. Emco-Wheaton, Inc.*, 936 F. Supp. 351, 353 (M.D. La. 1996); *O'Brien v. Powerforce, Inc.*, 939 F. Supp. 774, 778 & nn.1 & 2 (D. Haw. 1996); *Beisel v. Aid Ass'n for Lutherans*, 843 F. Supp. 616, 618-19 (C.D. Cal. 1994); *Rashid v. Scenck Construction Co.*, 843 F. Supp. 1081, 1086-87 n.6 (S.D. W.

Va. 1993); *Perez v. General Packer, Inc.*, 790 F. Supp. 1464, 1468 (C.D. Cal. 1992); *Hom. v. Service Merchandise Co., Inc.*, 727 F. Supp. 1343, 1345 (N.D. Cal. 1990); *Rezendes v. Dow Corning Corp.*, 717 F. Supp. 1435, 1437-38 (E.D. Cal. 1989); the latest case to so hold offers an extensive review of the history and purpose of 1446(b) amendments in *Newman v. Brent*, 1998 Dist. Lexis 10476 (D.D.C. July 8, 1998). And of course this Court noted last term that "no case, however, may be removed from state to federal court based on diversity of citizenship 'more than 1 year after commencement of the action.' " *Caterpillar, Inc. v. Lewis*, 117 S.Ct. 467, 473 (1996). Petitioner construes the Court's meaning of that statement in Caterpillar that *no case means no case.*

The Ninth Circuit viewed a portion of the 1988 amendment to § 1446(b) as supporting its conclusion, noting that the House Report on the proposed amendment expressed the thought that what Congress was attempting to do by enacting the 1 year limitation to diversity removal was preclude removal "late in the proceedings" at a time when it is likely that "substantial progress has been made in state court." H.R. Rep. No. 889, 100th Cong., 2d Sess., at 71-73 (1988) reprinted in 1988 U.S.C.C.A.N. 5982, 6031-34. As the circuit court acknowledged, this is hardly a ringing endorsement of its views. App. 8.

Numerous other cases have assumed without deciding that the one-year limitation on removal is absolute. See *Caterpiller, Inc. v. Lewis*, 519 U.S. 61, 117 S.Ct. 467, 473 (1996); *Singh v. Daimler-Benz AG*, 9 F.3d 303, 309 (3d Cir. 1993); *In re Uniroyal Goodrich Tire Co.*, 104 F.3d 322, 323 (11th Cir. 1997). The Commentary on 1988 Revision of

Section 1446 in the United States Code Annotated (West, 1997) makes the same assumption and specifically states it was intended to apply to all diversity removal based upon claims of fraudulent joinder. See Anno. at pp. 316-318. Moreover, at least one district court has held that the one-year limitation of § 1446(b) is jurisdictional. See *Green Point Savings Bank v. Hidalgo*, 910 F. Supp. 89 (E.D.N.Y. 1995) (granting motion to remand).

Certiorari should be granted to resolve the uncertainty surrounding the proper construction of § 1446(b), and to determine whether its one-year diversity removal limitation is jurisdictional. Both circuits to reach the issue have ruled in favor of expansive federal jurisdiction, which is inconsistent with the limited nature of federal diversity jurisdiction and Article III, Section 2 of the Constitution. *Caterpillar*, 117 S.Ct. at 472-73.[2] It is particularly important to have a definitive statement from this Court on this issue, because the inconsistent results in the resolution of removal petitions leads to uncertainty and unfairness. This particularly important as those cases in which motions to remand have been granted, § 1447(d) precludes direct appeal of the remand order. See, e.g., *Green Point Sav. Bank v. Cortez*, 104 F.3d 351 (Table), 1996 WL 549729 (2nd Cir. 1996). As a result, circuit court cases do not adequately reflect the true range of factual

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[2] The Judicial Conference of the United States, in it's 1995 "Long Range Plan for the Federal Courts", called for diversity jurisdiction to be severely restricted, noting that diversity jurisdiction then accounted for "about one of every two civil trials" and "a massive diversion of federal judge power away from their principal function" (p. 31)

situations and judicial analysis of this issue, and district judges are left without a definitive statement on the construction of § 1446(b).

2. Review By This Court Is Necessary To Decide An Important Question Of Federal Jurisdiction Given The Circuits And District Courts' Lack Of A Clear And Unambiguous Position Regarding The Nature And Extent Of the Power Of The Federal Courts Under Article III, Section 2 Of The Constitution And The 1988 Amendments to 28 U.S.C. § 1446(b) To Examine The Merits Of Claims Arising Solely Under State Law Brought In State Court Against Non-Diverse State Court Defendants.

The circuit court in this case determined that the non-diverse defendants were fraudulently joined because as to them, "the statute of limitations had long since run, regardless of whether Ritchey's new cause of action is characterized as a personal injury cause of action or a fraud cause of action." 139 F.3d at 1320. This curious result was done without regard to California substantive law on state conspiracies that toll the statute of limitations which is binding on a federal court sitting in diversity. See, *Allied Equipment Corp. v. Litton Saudi Arabia Corp.*, 7 Cal. 4th 503, 510 (1994) (discusses elements of civil conspiracy); *Hackethall v. National Casualty Company*, 189 Cal. App. 3d 1102, 1111 (1987) (elements of deceit and fraud); *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773 (1979) and *Stevens v. Superior Court*, 180 Cal. App. 3d 605 (1986) (elements of fraudulent and intentional concealment with facts strikingly similar to the facts alleged in petitioner's

complaint. *Molko v. Holy Spirit Association*, 46 Cal. 3d 1092 (1988) (independent claim of conspiracy serves as complete bar to statute of limitations defense). See comprehensive countervailing Declarations of Joe Ritchey in Support of Petition for Remand. (App. 68 & 74.)

In order to reach this result, the circuit court did two things which are inconsistent with the jurisprudence of this Court, and upon which there is disagreement among the circuit courts in determining an issue of fraudulent joinder. See, Archibald, *Reintroducing "Fraud" to the Doctrine of Fraudulent Joinder*, 78 Va. L. Rev. 1377, 1392-1396 (1992).

First, instead of considering whether the Plaintiff had, in good faith, sought to impose joint liability upon all the defendants in his complaint, the circuit court instead looked outside the pleadings in favor of the defendants only, and purported to determine that no cause of action was well pled in the state court complaint against either the non-diverse defendants or the diverse defendant. Second, instead of placing a heavy burden of persuasion on the removing defendant to establish fraudulent joinder, the circuit court instead applied a stringent analysis of the complaint and the surrounding facts, narrowly construing the causes of action arising under California law, which were asserted or which could have been more specifically asserted against the non-diverse defendants by Petitioner's offered amendment of the complaint and as factually specifically detailed in Petitioners responsive pleadings to the claims of fraudulent joinder.

By refusing to consider Petitioner's offered Amendments to the complaint that would have been allowed as a matter of right in State Court under California's liberal amendment and pleading rules, the Federal Court granted Upjohn and the California defendants procedural privileges they would not have received in state court. At the hearing on Petitioner's motion to remand, the district court judge recognized this anomaly, admitting that had the case been returned to state court it would have gone forward. (See remarks of the district judge at the May 3, 1996 remand hearing at supra pages 5-6) Thus, the approach taken by the circuit court in this case improperly rewards forum shopping defendants who remove in order to present their defenses in a more favorable federal forum. See *Angel v. Bullington*, 330 U.S. 183, 192 (1947).[3]

As early as *Powers v. Chesapeake & O. Ry. Co.*, 169 U.S. 92 (1898), this Court acknowledged that fraudulently joining a domiciliary of the forum state as a party defendant would not defeat diversity jurisdiction. And in *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921), this Court affirmed the assertion of jurisdiction upon removal of a case from Alabama state court, holding that diversity existed because the "joinder [of an Alabama citizen] was a sham and fraudulent – that is, without any reasonable basis in fact and without any purpose to prosecute the

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[3] "A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the constitution so as to prevent discrimination against outsiders is not to affect discrimination against the great body of local citizens." (330 U.S. at 192)

cause in good faith against [the Alabama citizen]." *Id.* at 98.

In subsequent cases, this Court has affirmed that the purpose for the doctrine of fraudulent joinder was to prevent plaintiffs from defeating federal diversity jurisdiction by joining resident defendants whom the plaintiff did not intend to pursue, and against whom joint liability could not be established. See *Pullman Co. v. Jenkins*, 305 U.S. 534, 541 (1939) (diverse defendant may show that the non-diverse defendant has not been joined in good faith, and thus should not be considered in determining the right to remove); *Chicago, R. I. & P. R. Co. v. Dowell*, 229 U.S. 102, 113 (1913) (where plaintiff had a cause of action which was joint, and had elected to sue both tort feasors in one action, his motive in doing so is of no importance); *Illinois Cent. R. Co. of State of Illinois v. Sheegog*, 215 U.S. 308, 316 (1909) (joinder cannot be fraudulent where the legal effect of the complaint was to allege joint liability as against both diverse and non-diverse defendants); *Chesapeake & O. R. Co. v. Cockrell*, 232 U.S. 146 (1914) (fraudulent joinder was not established by a petition which attacked the merits of the complaint). In *Cockrell*, the Court held that diversity could not be established by a petition which "manifestly went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants." *Id.* at 153.

Despite the guidance of this long-settled body of law, some circuit courts, such as the Ninth Circuit in the instant case, have engrafted a summary judgment-like procedure upon the determination of motions to remand where the diverse defendant claims fraudulent joinder.

See *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992); *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981). This approach frequently leads federal circuit courts beyond the existence vel non of fraudulent joinder into the underlying merits of the case, as occurred here. Moreover, the other circuit courts which have addressed this issue have applied differing principles and have come to inconsistent results.

The Third Circuit rejects the view of fraudulent joinder found in Fifth and Ninth Circuit cases, instead holding that "summary judgment type inquiry made by the district court" is wrong in a fraudulent joinder analysis. *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 112 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991). In contrast to the approach taken by the Fifth and Ninth Circuits, the Third Circuit held that even if some piercing of the pleadings is appropriate to decide whether "plaintiffs have asserted a 'colorable' ground supporting the claim against the joined defendant, that inquiry is far different from a summary judgment type inquiry." *Id.*

The Third Circuit further explained its view of the limited extent of a district court's review of the merits on a remand petition in *Batoff v. State Farm Insurance Company*, 977 F.2d 848 (3d Cir. 1992). There, the court held that "the inquiry into the validity of a complaint triggered by a motion to dismiss under Rule 12(b)(6) is more searching than that permissible when a party makes a claim of fraudulent joinder." Therefore, said the court, a party cannot be fraudulently joined, even if "the claim against that party ultimately is dismissed for failure to state a claim upon which relief may be granted." *Id.* at 853. The Third Circuit's holding is consistent with *Neitzke*

v. Williams, 490 U.S. 319 (1989), in which this Court held that a complaint which fails to state a claim sufficient to withstand a Rule 12(b)(6) motion is not automatically frivolous within 28 U.S.C. § 1915(d), so as to be subject to dismissal when brought in forma pauperis. See, Catz & Guyer, *Federal In Forma Pauperis Litigation: In Search of Judicial Standards*, 31 Rutgers L. Rev. 655, 665 (1978).

Numerous cases have recognized that some limited piercing of the allegations to discover fraudulent joinder may be appropriate in some circumstances, but there is a lack of consistency in the approach and outcome. For example, in *Smoot v. Chicago, Rock Island & Pac. R.R. Co.*, 378 F.2d 879 (10th Cir. 1967), diversity jurisdiction was upheld where the non-diverse employee of defendant railroad had uncontestedly discontinued his employment with the railroad 15 months before the accident in question. See also *Lobato v. Pay Less Drug Store, Inc.*, 261 F.2d 406 (10th Cir. 1958) (absence of allegations that individual non-diverse defendants participated in tortious acts alleged). These cases do not adopt the approach used by the Ninth Circuit and the Fifth Circuit, both of which go well beyond the threshold inquiry of jurisdiction, and delve into the merits of the allegations of the complaint in Fed. R. Civ. Proc. 56(c) fashion.

Instead, the Tenth Circuit approach appears to agree with that of the Third Circuit. In *AIDS Counseling & Testing Centers v. Group W Television, Inc.*, 903 F.2d 1000 (10th Cir. 1990), for example, the court pointed out that the purpose behind the fraudulent joinder analysis is to determine if "there [is] no real intention to get a joint judgment, and . . . there [is] no colorable ground for so claiming." *Id.* at 1003.

For its part, the Second Circuit has stated,

> In order to show that naming a non-diverse defendant is a "fraudulent joinder" effected to defeat diversity, the defendant must demonstrate, by clear and convincing evidence, either that there has been outright fraud committed in the plaintiff's pleadings, or that there is no possibility, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court. The defendant seeking removal bears a heavy burden of proving fraudulent joinder, and all factual and legal issues must be resolved in favor of the plaintiff.

Pampillonia v. RJR Nabisco, 138 F.3d 459, 460-61 (2d Cir. 1998).

However, it appears that the Second Circuit did examine the underlying merits of the Complaint in deciding that the non-diverse defendant had been joined fraudulently in that case. See *id.* at 461-62.

In the instant case, the approach taken by the Ninth Circuit led into a morass of state court procedure and substantive law, illustrating yet another reason why this expansion of federal court jurisdiction should be examined by this Court. In order to reach its determination that the non-diverse defendants were fraudulently joined, the circuit court in this case first held that California's procedural rules, specifically its "general demurrer" rules, California Civil Code § 430.10(f), would permit the California defendants to raise a statute of limitations defense to Plaintiff's admittedly sufficient causes of action when originally filed in state court. 139 F.3d at

1318. The Ninth Circuit inexplicably refused to even discuss that in state court Petitioner would have been allowed to file opposing papers, declarations and to even have filed a first amended complaint as a matter of right in state court.

Next, still applying California procedure and substantive law, the circuit court purported to find that the personal injury statute of limitations summary judgment ruling in favor of Upjohn in *Ritchey I* would absolutely preclude Petitioner from asserting in state court the fraud and conspiracy causes of action he alleged against Upjohn, Dement and the other California state residents in the 1994 state court action, and simply assumed without discussion the Plaintiff would not be able to plead a state law exception to the application of the statute of limitations or a state law exception to the bar of res judicata, a bar solely based on the earlier summary judgment founded on the statute of limitations. *Id.*[4]

In so ruling, the circuit court ignored the effect of settled California law, which holds that a summary

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[4] In California State courts Upjohn has lost every published case on Halcion. The California Supreme Court ruled against them in a case dealing with pleading of actions. *Carlin v. Superior Court of Sutter County*, 13 Cal. 4th 1104; 920 P.2d 1347, 1996; 56 Cal. Rptr. 2d 162 and the Court of Appeals most recently (June of 1998) ruled against them in a case dealing with the statute of limitations and summary judgment. *Norgart v. Upjohn Co.*, 64 Cal. App. 4th 192 (1998), 74 Cal. Rptr. 2d 807. Further, the case relied upon by all defendants in District Court in the *Ritchey II* case for the proposition that the Statute of Limitations had run, and, indeed, the one cited and relied upon below by the District Court (*Bristol-Meyers Squibb Co. v. Superior Court* (1995), 32 C.A. 4th 959), was extensively criticized as bad law by the *Norgart* Court, and the court refused to follow it.

judgment based on the statute of limitations regarding a cause of action in one suit is not res judicata in a second suit, even when the cause of action pleads the same core of underlying facts but alleges newly discovered evidence indicating that the bar of the statute of limitations does not apply. CCP 597 and *Lucas v. County of Los Angeles*, 47 C.A. 4th 277 (July 1996). Significantly, neither the district court nor the circuit court suggested that the California defendants were improperly joined in violation of California procedural rules, and Petitioner's allegations of joint liability against all the defendants, diverse and non-diverse alike, were unquestionably made in good faith under California substantive and procedural rules of law.

In taking this approach, the Ninth Circuit strayed far from its obligation to make a determination whether the Petitioner had actually joined the California citizens as defendants fraudulently and without an intent to proceed against them in state court. Instead, as a perusal of the district court's Orders in this matter illustrates, the court applied the same Fed. R. Civ. Proc. 12(b)(6) analysis to all of the defendants, diverse and non-diverse, and determined that Petitioner had failed to state a claim against any of them. App. 18. But as the Third Circuit pointed out when it rejected this approach, the Ninth Circuit thus "stepped from the threshold jurisdictional issue into a decision on the merits." *Boyer*, 913 F.2d at 112. This a federal court sitting in diversity may not do under Article III, Section 2. See *Chesapeake & Ohio Ry. v. Cockrell*, 232 U.S. 146, 34 S.Ct. 278, 58 L.Ed. 544 (1914).

The effect of the circuit court's holding in this case is to usurp the power and the right of California's courts to determine whether one California citizen's claim against

other California citizens is truly barred by California's statute of limitations and California's rules of res judicata, all in the name of protecting a non-Californian's statutory purported right of access to federal court. While the Fifth Circuit evidently agrees with the Ninth Circuit's approach in such matters, this Court's prior rulings as well as holdings in the Second, Third and Tenth Circuits would produce a contrary result.

Certiorari should be granted to resolve this conflict in views taken by the circuits on fraudulent joinder as a basis for asserting diversity jurisdiction, for presently the Fifth and Ninth Circuits have adopted rules which improperly expand federal subject matter jurisdiction beyond its statutory limits and Article III of the Constitution, diminish States' rights and deprive plaintiffs of their right to pursue their state law claims in a state court of general jurisdiction, a court better suited to apply state procedural and substantive law.

In sum if Petitioner truly had no valid state cause of action against the non-diverse defendants, all defendants could have filed motions in state court and the matter there just as quickly, or even more so, disposed of than in Federal Court. Also, of course, the non-diverse defendants could have sought summary judgment, claiming res judicata and/or the bar of the statute of limitations, in state court and then Upjohn could have then removed based upon diversity, and, if granted, then sought in federal court the below requested summary judgment, or in the alternative, 12(b)(6) relief.

Petitioner contends the federal court should not have and did not need to decide the numerous state law issues

and claims. If all the Defendants named in *Ritchey II* had filed motions in state court seeking orders terminating the action, no federal court expenditure of resources would have been necessary and the issue would not have been wrongly decided. The federal court would not have interfered in state law matters, Article III of the United States Constitution would have been better respected, and with limited federal judicial resources better preserved.

It is also Petitioner's contention that by specifically stating in the second paragraph of 28 U.S.C. § 1446(b) " . . . except that a case may not be removed on the basis of jurisdiction conferred by Section 1332 of this title more than one year after commencement of the action", Congress intended no "Section 1332" removal occur "more than one year after commencement of the action." This of course would apply to all diversity removal, probably the most unnecessary and perhaps the largest expenditure of limited federal judicial time and resources. Congress and the Judicial Conference of the United States would not have been unhappy with such a savings to the federal judicial system, and others would be pleased with the resulting respect for the rights of the states to administer their own laws, especially when their own citizens are involved.

CONCLUSION

The petition for writ of certiorari should be granted so these important statutory and constitutional questions on the proper role of federal courts in deciding state factual issues and state law questions of procedural and substantive law as applied to state domiciled defendants.

Respectfully submitted,

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August 25, 1998

APPENDIX INDEX

Page

Opinion in Ritchey v. Upjohn Drug Co., et al., No. 96-17014 (9th Cir. 1998).....App. 1

Order Granting Defendants' Motions to Dismiss, No. C-96-20067 RMW (N.D. Cal. Sep. 9, 1996).....App. 18

Order Denying Plaintiff's Motion to Remand, No. C-96-20067 RMW (N.D. Cal. Sep. 9, 1996)....App. 25

Order Denying The Petition for Rehearing and the Suggestion for Rehearing En Banc, No. 96-17014 (9th Cir. May 27, 1998).....App. 36

Complaint for Damages, No. 12837, Superior Court, State of California, County of Santa Cruz, Jan. 3, 1994 .....App. 37

Memorandum Opinion, Ritchey v. Upjohn Drug Co., et al., No. 94-15171 (9th Cir. 1995) .....App. 53

Complaint, No. 113198, State of California, County of Santa Cruz, Mar. 12, 1990.....App. 56

Notice of Intent to File Petition for Remand, Notice that Consent to Remand was Requested and Refused, and Notice of Request for Sanctions .....App. 68

Declaration of Joe Ritchey in Support of Petition for Remand .....App. 74

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOE B. RITCHEY, *Plaintiff-Appellant,* v. UPJOHN DRUG COMPANY; WILLIAM DEMENT, *Defendants-Appellees.*	No. 96-17014 D.C. No. CV-96-20067-RMW OPINION

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted
February 13, 1998 – San Francisco, California

Filed April 3, 1998

Before: Procter Hug, Jr., Chief Judge, and
Ferdinand F. Fernandez and Sidney R. Thomas,
Circuit Judges.

Opinion by Judge Fernandez

COUNSEL

Joe B. Ritchey, Santa Cruz, California, for the plaintiff-appellant.

Michael F. Healy, Sedgwick, Detert, Moran & Arnold, San Francisco, California, for the defendant-appellee; Charles

Preuss, Preuss Walker, and Shanagher, San Francisco, California, for the defendants-appellees.

OPINION

FERNANDEZ, Circuit Judge:

Joe B. Ritchey brought this action against the Upjohn Company, Dr. William Dement, and Stanford Health Services[1] in the California Superior Court for Santa Cruz County. Upjohn removed the case to the United States District Court pursuant to 28 U.S.C. § 1441(a). That was based upon Upjohn's assertions that there was complete diversity of citizenship between it and Ritchey, and that the other purported defendants were shams because they could rely upon the defenses of the statute of limitations and res judicata. Ritchey moved to remand on the basis that there was a lack of complete diversity. The district court denied the remand and ultimately awarded summary judgment to all of the defendants. Ritchey appeals. We affirm.

BACKGROUND

The gravamen of Ritchey's action is that in 1983 and thereafter he was taking Halcion, a drug manufactured by Upjohn, which caused him to suffer a number of side effects. Those ultimately led to his conviction of criminal offenses, and other serious damages. He claims that

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[1] Whether service was ever properly made upon Stanford Health Services is disputed by the parties. At any rate, a voluntary appearance was made and we will hereafter refer to the appealing party as Stanford.

Upjohn was responsible because it suppressed information about the side effects, and that Dr. Dement and Stanford conspired with Upjohn to conceal the negative information they all had about Halcion.

This action was filed in state court in 1994, but it was not the first time Ritchey had sued Upjohn over Halcion. In fact, he had brought an action in March of 1990 based on the same ingestions of the drug and the same resulting injuries. In October of 1993, the United States District Court had granted summary judgment against him on the grounds that at its core the action was one for personal injuries and California's one-year statute of limitations for personal injury actions had run before he sued. We affirmed that dismissal on June 6, 1995. *See Ritchey v. Upjohn Drug Co.*, No. 94-15171 (9th Cir. 1995) (unpublished disposition).[2] In *Ritchey I* we held that he was clearly on notice about Upjohn's wrongdoing, which hurt him, as early as August of 1988 and no later than March of 1989.

However, on January 3, 1994, which was after the district court ruled but before we affirmed, Ritchey had filed this action in state court. It was based upon the same underlying facts as *Ritchey I*, but he also alleged that Stanford, Dr. Dement, and Upjohn had engaged in a conspiracy. He gave no notice of this action to the defendants until sometime in December of 1995.[3] On January

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[2] We will refer to this first course of action as *Ritchey I*.

[3] Ritchey now suggests that the case was not removed within the required 30 day period. *See* 28 U.S.C. § 1446(b). He waived that issue when he failed to raise it within 30 days after removal. *See* 28 U.S.C. § 1447(c); *Northern California Dist. Council*

29, 1996, Upjohn removed this action to the United States District Court, even though it is clear that Dr. Dement and Stanford are not diverse. They and Ritchey are citizens of the State of California. Upjohn, however, asserted that Dr. Dement and Stanford were sham defendants, who were fraudulently joined for the purpose of defeating diversity. It claimed that because, it said, the defenses of res judicata and the statute of limitations, which arose out of *Ritchey I*, barred any action against them. The district court agreed and denied Ritchey's motion to remand. Ultimately, it also dismissed this action as against Upjohn, Dr. Dement and Stanford on the ground that it was barred by the determinations in *Ritchey I*. This appeal followed.

STANDARDS OF REVIEW

We review the district court's interpretation of a statute de novo. *See Allen v. Shalala*, 48 F.3d 456, 457 (9th Cir. 1995). We also review issues of subject matter jurisdiction and denials of motions to remand removed cases de novo. *See Attorneys Trust v. Videotape Computer Prods., Inc.*, 93 F.3d 593, 594 (9th Cir. 1996) (jurisdiction); *Duncan v. Stuetzle*, 76 F.3d 1480, 1484 n.4 (9th Cir. 1996) (remand denial). Finally, we review dismissals on the ground of res judicata de novo. *See United Parcel Serv., Inc. v. California Pub. Utils. Comm'n*, 77 F.3d 1178, 1182 (9th Cir. 1996).

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of Laborers v. Pittsburg-Des Moines Steel Co., 69 F.3d 1034, 1038 (9th Cir. 1995). Moreover, he did not raise the issue before us until his reply brief. That he cannot do. *See Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990).

JURISDICTION

We have jurisdiction pursuant to 28 U.S.C. § 1291. If the district court had jurisdiction, it was pursuant to 28 U.S.C. § 1332(a) on the theory that this was a diversity action, which was properly removed pursuant to 28 U.S.C. § 1441(a). That, however, raises the primary issues in this case. We must first ask whether the action was removable on any basis, and then ask whether it could be removed on the basis that Dr. Dement and Stanford were fraudulently joined defendants. That requires us to construe 28 U.S.C. § 1446(b) and the law of fraudulent joinder.

A. *Section 1446(b)*

Ritchey first argues that the removal of this action was absolutely precluded by the provisions of 28 U.S.C. § 1446(b). We do not agree, but the explanation takes some telling. We start, as we must, with the words of § 1446(b) itself:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed

> within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

Id. While at first glance the statute appears rather clear, Ritchey and others contend that a difficulty lurks within it. Plainly enough the statute provides in its first paragraph that a defendant can remove within 30 days of service of the initial pleading upon him. The second paragraph, however, explains that "[i]f the case stated by the initial pleading is not removable," the defendant can remove at a time later than the 30-day period provided for in the first paragraph. *Id.* However, the second paragraph goes on to provide a broadly phrased exception when it declares that "a case may not be removed on the basis of jurisdiction conferred by § 1332 of this title [diversity jurisdiction] more than 1 year after commencement of the action." *Id.* If that exception applies only to the type of removal referred to in the second paragraph, it does not preclude removal in this case unless the case was *not* removable at its inception. If, as Ritchey argues, the limitation in the second paragraph applies to both that paragraph and the first paragraph, it does, on its face, preclude removal of this case, regardless of the condition of the original pleading. In other words, removal would be precluded because considerably more than 1 year had passed from the date of commencement of this action to the date that Upjohn attempted to

remove, even though neither it nor any other defendant had been served between January 3, 1994, and December of 1995.

As an initial matter, we must construe this statute by looking at its plain language, which includes its sentence structure. We recognize that "[r]emoval jurisdiction is statutory and strictly construed." *Gould v. Mutual Life Ins. Co. of New York*, 790 F.2d 769, 773 (9th Cir. 1986). However, we see no reason to twist ordinary language usage and rules of grammar in order to preclude removal. In that regard, the most sound reading of a sentence will refer its limiting clause back to the antecedent clause to which it is attached, and not to other paragraphs or sentences in the statute. *See Pacificorp v. Bonneville Power Admin.*, 856 F.2d 94, 97 (9th Cir. 1988). ("The date limitation . . . refers directly back to the antecedent phrase. . . . "); *Zogbi v. Federated Dep't Store*, 767 F. Supp. 1037, 1039 (C.D. Cal. 1991) ("The general rule is that a qualifying phrase or clause only modifies that which immediately precedes it.")

We see no reason to deviate from that mode of reading here. The first paragraph of § 1446(b) addresses a defendant's right to promptly remove when he is served. The second paragraph addresses a defendant's right to remove beyond the initial period of 30 days, if the case only becomes removable sometime after the initial commencement of the action. Only the latter type of removal is barred by the one-year exception.

Because we are satisfied that this reading is plain on the face of the statute, there should be little reason to consider legislative history. *See Oregon Natural Resources*

Council, Inc. v. Kantor, 99 F.3d 334, 339 (9th Cir. 1996) (if the language of a statute is clear, we look no further in determining its meaning, unless the apparent plain meaning leads to an absurd or impracticable result); *United States v. Neville*, 985 F.2d 992, 995 (9th Cir. 1993) (if the statute is clear and unambiguous there is no need to turn to legislative history); *Coalition for Clean Air v. Southern Cal. Edison Co.*, 971 F.2d 219, 227 (9th Cir. 1992) ("there is no need to refer to the legislative history of a statute when the language of the statute is clear"). Nevertheless, as we will further discuss below, other courts have disagreed with our reading. Thus, we have looked to the legislative history. We find it rather unhelpful, but to the extent that it helps at all it lends support to our reading. The House Report expressed the thought that what Congress was attempting to do was preclude removal "late in the proceedings" at a time when "substantial progress has been made in state court." H.R. Rep. No. 889, 100th Cong., 2d Sess., at 71-73 (1988) *reprinted in* 1988 U.S.C.C.A.N 5982, 6031-34. That supports the placement of the exception in the second paragraph because no substantial progress could ordinarily be expected if the case were immediately removable at the time of the initial pleading. Generally speaking, the case would either be removed promptly or not at all in that event.

While we are satisfied that the statute must be interpreted in this way, we acknowledge that the authorities are not uniform on the issue. Two other courts of appeals have touched on the subject, but have not resolved it. *See Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1097 n.12 (11th Cir. 1994) (suggesting that if there were no true non-diverse party, the second paragraph would not apply); *Singh v.*

Daimler-Benz AG, 9 F.3d 303, 309 (3d Cir. 1993) (mentioning the provision, but not deciding the question before us). The district courts have been more active.

In *Zogbi*, 767 F. Supp. at 1039-40, the district court pointed to the statutory structure we have already discussed and went on to note that if Congress had intended the except clause to apply to both paragraphs of § 1446(b), it could easily have accomplished that result without requiring readers of the statute to rely on exotic grammatical usage. *See also, Greer v. Skilcraft*, 704 F. Supp. 1570, 1582 (N.D. Ala. 1989); *Kite v. Richard Wolf Med. Instruments Corp.*, 761 F. Supp. 597, 600-01 (S.D. Ind. 1989); *cf. Coman v. International Playtex, Inc.*, 713 F. Supp. 1324, 1326 (N.D. Cal. 1989).

Other district courts have determined that the limitation applies to both paragraphs because, in effect, removal statutes must be strictly construed and comity between state and federal courts will be preserved by that construction. *See O'Brien v. Powerforce, Inc.*, 939 F. Supp. 774, 778 & nn.1, 2 (D. Haw. 1996); *Kinabrew v. Emco-Wheaton, Inc.*, 936 F. Supp. 351, 353 (M.D. La. 1996); *Beisel v. Aid Ass'n for Lutherans*, 843 F. Supp. 616, 618-19 (C.D. Cal. 1994); *Rashid v. Schenck Constr. Co.*, 843 F. Supp. 1081, 1086-87 n.6 (S.D. W. Va. 1993); *Perez v. General Packer, Inc.*, 790 F. Supp. 1464, 1468 (C.D. Cal. 1992); *Hom v. Service Merchandise Co., Inc.*, 727 F. Supp. 1343, 1345 (N.D. Cal. 1990); *Rezendes v. Dow Corning Corp.*, 717 F. Supp. 1435, 1437-38 (E.D. Cal. 1989). With all due respect, we do not see how strict construction or other considerations can change the fact that the except clause is dependent on the non-removablilty [sic] of the case stated in the initial pleading. In saying all of this, we are not overlooking the

Supreme Court's comment that "[n]o case, however, may be removed from state to federal court based on diversity of citizenship 'more than 1 year after commencement of the action.' " *Caterpillar Inc. v. Lewis*, ___ U.S. ___, ___, 117 S. Ct. 467, 473, 136 L. Ed. 2d 437 (1996) (citation omitted). However, in that case the Court was speaking of actions not originally removable. *Id.* at ___, 117 S. Ct. at 472-73.

Finally, some courts have applied equitable estoppel doctrines to permit removal once they have decided that the except clause basically applies to defendants first served after one year has passed. In that way, they have attempted to ameliorate the fact that on their construction of § 1446(b), a plaintiff need only file an action in state court and then wait one year before service, if he wishes to deprive the defendant of the ability to remove under any circumstances. *See e.g., Kinabrew*, 936 F. Supp. at 353; *Saunders v. Wire Rope Corp.*, 777 F. Supp. 1281, 1283-85 (E.D. Va. 1991); *cf., Kite* 761 F. Supp. at 600-01; *Coman*, 713 F. Supp. at 1327-28; *Greer*, 704 F. Supp. at 1582-83. For the purposes of this case we need not decide whether courts should use that kind of sortilege to contract the except clause with an exception-to-the-exception overlay, which was not adopted by Congress. Suffice it to say that for now our reading of the statute simply leaves it, and the clause, where Congress put them.

B. *Sham Defendants*

Once we blow away the interpretive miasma and see § 1446(b) clearly, we must still consider whether this action was removable under the first paragraph of § 1446(b), or to put it another way, whether there was

diversity jurisdiction based upon the initial pleading, or whether there is diversity jurisdiction at this time for that matter. *See* 28 U.S.C. § 1332(a).

The existence of diversity jurisdiction certainly does not appear on the face of Ritchey's complaint. Moreover, there can be little doubt that non-diverse defendants – Dr. Dement and Stanford – have been joined in the action. Thus, at first blush it must be said that there was no diversity. But, says Upjohn, it is diverse and Dr. Dement and Stanford were fraudulently joined or sham defendants. In the posture of this case, we agree with that conclusion.

It is a commonplace that fraudulently joined defendants will not defeat removal on diversity grounds. *See Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1193 & n.1 (9th Cir. 1988); *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). But, "[f]raudulent joinder is a term of art. If the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent." *McCabe*, 811 F.2d at 1339. In deciding whether a cause of action is stated we have declared that we will "look only to a plaintiff's pleadings to determine removability." *Gould*, 790 F.2d at 773. And, we have commented that we will determine the "existence of federal jurisdiction . . . solely by an examination of the plaintiff's case, without recourse to the defendant's pleadings." *Self v. General Motors Corp.*, 588 F.2d 655, 657 (9th Cir. 1978). At least that is true when there has not been a fraudulent joinder. *Id.* at 659. Where fraudulent joinder is an issue, we will go somewhat further. "The defendant seeking removal to the federal court is entitled

to present the facts showing the joinder to be fraudulent." *McCabe*, 811 F.2d at 1339; *see also Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97-99, 42 S. Ct. 35, 37-38, 66 L. Ed. 144 (1921); *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 153-54, 34 S. Ct. 278, 280-81, 58 L. Ed. 544 (1914); *Alabama Great S. Ry. Co. v. Thompson*, 200 U.S. 206, 218-19, 26 S. Ct. 161, 165, 50 L. Ed. 441 (1906); *cf. Smith v. Southern Pac. Co.*, 187 F.2d 397, 400-01 (9th Cir. 1951).

That approach is reasonable and necessary. For example, a defendant must have the opportunity to show that the individuals joined in the action cannot be liable on any theory. Thus, in *McCabe* we looked to the complaint alone to determine that no wrongful discharge cause of action could be stated against the managers of a company for firing an employee of that company. *See* 811 F.2d at 1339. If we had been required to look at facts outside of the complaint to decide that issue, we would have done so. Similarly, the Supreme Court has pointed out that a removing defendant could submit facts showing that a resident defendant had "no real connection with the controversy." *Wilson*, 257 U.S. at 97, 42 S. Ct. at 37. But it is noteworthy that these cases looked to whether the plaintiff truly had a cause of action against the alleged sham defendants. The cases did not key on an inquiry as to whether those defendants could propound defenses to an otherwise valid cause of action. There is a distinction between those two concepts. The Supreme Court touched on the distinction in *Chesapeake & Ohio Ry.*, 232 U.S. at 153, 34 S. Ct. at 280, where it declared that the assertion made by the removing defendant "went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as

to all the defendants." Similarly, in *Alabama Great S. Ry.*, 200 U.S. at 218-19, 26 S. Ct. at 165, the Court refused to find fraudulent joinder where a misjoinder of parties was claimed by the defendant that was trying to remove the action. The Court commented that, ultimately, the state court might decide the joinder was not proper. In fact, if it had jurisdiction the Court might have done so itself. "But," it said, "this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal." *Id.*; *see also McCabe*, 811 F.2d at 1339 (failure to state a cause of action); *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1426-27 (9th Cir. 1989) (joinder fraudulent where no cause of action could be stated); *Gasnik v. State Farm Ins. Co.*, 825 F. Supp. 245, 247 (E.D. Cal. 1992) (joinder fraudulent where no cause of action could be stated); *cf. Sessions v. Chrysler Corp.*, 517 F.2d 759, 760-61 (9th Cir. 1975) (joinder not fraudulent if case can withstand a 12(b)(6) motion directed to sufficiency of the cause of action, however labeled).

Similar distinctions have been drawn in the rules governing federal question removal. Even when the area involved is one where complete preemption is the norm, if the complaint relies on claims outside of the preempted area and does not present a federal claim on its face, the defendant must raise its preemption defense in state court. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392-96, 107 S. Ct. 2425, 2430-31 96 L. Ed. 2d 318 (1987). The fact that preemption might ultimately be proved does not allow removal. *Id.* at 397-98, 107 S.Ct. at 2432; *see also Rivet v. Regions Bank*, ___ U.S. ___, 118 S. Ct. 921, 926, ___

L. Ed. 2d ___ (1998); *Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 934-36 (9th Cir. 1993). In other words, when the defense is exogenous to the cause of action itself, it will not turn a state action into a federal one.

While the above would tend to suggest that an exogenous defense could not turn a true defendant into a sham defendant, we need not resolve that issue. No doubt the statute of limitations is a defense, and a rather unique one at that. It is one that does not truly go to the merits of the plaintiff's claim in any sense. It does not assert some excuse or justification for what the defendant is alleged to have done, nor does it assert any release or waiver of any right of action against the defendant. It does not even deny the wrong or claim contributory fault or set off. Rather, it virtually admits the validity of the cause of action and the plaintiff's right to collect upon it, but asserts that the plaintiff waited too long to pursue the cause of action. California has emphasized the fact that the statute of limitations is a kind of procedural bar, and not one which relates to the merits of the case. *See Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992); *Piazza Properties v. State Dept. of Motor Vehicles*, 71 Cal. App. 3d 622, 628, 138 Cal. Rptr. 357, 360 (1977); *O'Neil v. Spillane*, 45 Cal. App. 3d 147, 156, 119 Cal. Rptr. 245, 252 (1975). In fact, California has pointed out that a judgment based on the statute of limitations regarding a cause of action in one suit is not necessarily res judicata in a second suit, which pleads a different cause of action based on the same core of underlying facts. *See Koch v. Rodlin Enters., Inc.*, 223 Cal. App. 3d 1591, 1596-97, 273 Cal. Rptr. 438, 441-42 (1990).

However, even though California takes that position, it also takes the position that a defendant may file a demurrer to a complaint on the theory that the complaint "does not state facts sufficient to constitute a cause of action." Cal. Civ. Proc. Code § 43.10(f). It has long been the law that this principle applies to statute of limitations defenses, even though, technically, a defense is not part of the cause of action itself. *See Bank of America Nat'l Trust & Sav. Ass'n v. Ames*, 18 Cal. App. 2d 311, 314-15, 63 P.2d 1208, 1209-10 (1936). The defendant may file the demurrer when the defect appears on the face of the complaint or in any material "of which the court is required to or may take judicial notice." Cal. Civ. Proc. Code § 430.30(a). Moreover, it is clear that "[i]n ruling on a demurrer essentially founded on res judicata," a court may "take judicial notice of a prior judgment in a different case even though such judgment or its content is not pleaded in the complaint. . . . " *Flores v. Arroyo*, 56 Cal. 2d 492, 496, 364 P.2d 263, 265, 15 Cal. Rptr. 87, 89 (1961).

In this case, when the strobe of judicial notice is played upon Ritchey's pleading, it appears perfectly clear that the statute of limitations is a defense, which California would apply through the medium of a demurrer. The action against Dr. Dement and Stanford is barred by the statute of limitations. The harm was well known to Ritchey several years before he brought his action, and he also knew what wrongdoing had caused that harm. *See Ritchey I.* Ultimately, it was Upjohn's own alleged wrongdoing in concealing information about Halcion which caused the harm, as Ritchey previously alleged. *See Ritchey I.* Ritchey has now attempted to cobble together a claim that Dr. Dement and Stanford helped Upjohn to

perpetrate that harm by helping it misrepresent data. That, however, is outside the point. It is pellucid that by the time the complaint in question was filed, January 3, 1994, the statute of limitations had long since run, regardless of whether Ritchey's new cause of action is characterized as a personal injury cause of action or a fraud cause of action. Our decision in *Ritchey I* makes it clear that the statute of limitations started to run in March of 1989 at the latest. Thus, as we held in *Ritchey I*, the one year statute of limitations had clearly run. Moreover, in California the statute of limitations for fraud is three years. *See* Cal. Civ. Proc. Code § 338. Again, that three year period had clearly run long before the current complaint was filed.

We recognize that if Dr. Dement and Stanford had not asserted the statute of limitations, Ritchey's cause of action against them might well be viable. That, again, is the slight anomaly in speaking of the statute of limitations as a ground for dismissing a complaint on the theory that it does not state of cause of action. At any rate, the statute of limitations was asserted in this case. Therefore, under California law no cause of action was stated. We recognize that it is, perhaps, slightly peculiar to speak of Dr. Dement and Stanford as sham defendants because the statute of limitations bars a claim against them, when that would seem to lead to an argument that Upjohn itself is a sham defendant because the statute of limitations has also run against it. Nevertheless, the fact is that Ritchey did not state a cause of action against anyone, and his failure to state that cause of action against Dr. Dement and Stanford demonstrates beyond

peradventure that they were sham defendants for purposes of removal. *Id.*

CONCLUSION

Upjohn faced Ritchey once before in the federal courts and won the day. It now finds itself sued, along with others, in an action that appears to be the same essential claim as the one it faced before. Having prevailed in the first agon in federal court, it understandably does not wish to struggle with Ritchey in another forum, even if the struggle turns out to be a short one. It is true that in his second action Ritchey also joined non-diverse parties, Dr. Dement and Stanford, but he has not spelled out a cause of action against them under California law. That being so, we hold that they were fraudulently joined for diversity and removal purposes. As a result, this case was properly removed. Upjohn and its co-defendants need not answer Ritchey's chamade to meet him in the California Superior Court for Santa Cruz County.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOE B. RITCHEY, Plaintiff, v. THE UPJOHN DRUG COMPANY, WILLIAM DEMENT, and DOES 1 through 10, Defendants.	NO. C-96-20067 RMW ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS (Filed Sep. 9, 1996)

Defendants The Upjohn Drug Company ("Upjohn"), Stanford Health Services ("Stanford") and William Dement ("Dement") filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The court has read the papers submitted in connection with the motions and heard the argument of counsel. For the reasons set forth below, the court grants defendants' motions to dismiss.

I. BACKGROUND

Plaintiff filed a complaint on March 12, 1990 in the Santa Cruz Superior Court alleging injuries caused by the ingestion of Halcion, a prescription sleeping medication manufactured by Upjohn ("Ritchey I"). The action was removed to this court based on diversity jurisdiction.

On October 26, 1993, this court entered an order granting summary judgment in favor of Upjohn. *Ritchey v. Upjohn*, D.C. No Civ. 92-20208 RMW (N.D. 1993) aff'd

No. 94-15171 (9th Cir. 1995). This court concluded that the one year statute of limitations applied to plaintiff's claims. The evidence submitted by Upjohn demonstrated that plaintiff was aware that Halcion may have been the cause of his problems more than one year before filing the complaint in March 1990. Therefore, this court concluded that the statute of limitations barred plaintiff's claims against Upjohn. Plaintiff filed two motions for reconsideration of the judgment with this court, both of which were denied.

Plaintiff appealed the prior unfavorable judgment to the United States Court of Appeals, Ninth Circuit. The Court of Appeals affirmed this court's grant of summary judgment on June 8, 1995. Plaintiff petitioned for a rehearing and a suggestion for a rehearing en banc, both of which were denied on September 28, 1995.

On January 3, 1994, which was after the court granted summary judgment in the prior action, plaintiff filed this current action ("Ritchey II") in Santa Cruz Superior Court. Ritchey II seeks recovery for the same alleged injuries arising from plaintiff's use of Halcion. Upjohn, Stanford and Dement are named defendants in Ritchey II, which attempts to state causes of action for "fraud and intentional misrepresentation" and "common law civil conspiracy" to commit fraud. The defendants seek to dismiss the complaint on the grounds, among others, of res judicata and the bar of the statute of limitations.

II. LEGAL STANDARD

The court may dismiss a complaint as a matter of law for either of two reasons: (1) lack of a cognizable legal

theory, or (2) the pleading of insufficient facts under a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533 (9th Cir. 1984) (citations omitted). In ruling on a motion to dismiss, district courts must accept all material allegations of fact alleged in the complaint as true and resolve all doubts in favor of the plaintiff. *Blake v. Dierdorff*, 856 F.2d 1365, 1368 (9th Cir. 1988). The court, however, need not accept legal conclusions asserted in the complaint even if pled as "facts." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). The court is to grant the motion to dismiss if it appears that plaintiffs can prove no set of facts which would entitle plaintiffs to relief. *Sun Savings & Loan Assoc. v. Dierdorff*, 825 F.2d 187, 191 (9th Cir. 1987).

III. DISCUSSION

Defendant Upjohn contends that the complaint in Ritchey II states no claim upon which relief may be granted because all causes of action have already been determined to be barred by the statute of limitations.

Essentially, the doctrine of res judicata bars all grounds for recovery which either were or could have been asserted in prior litigation. *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992). Pursuant to 28 U.S.C. section 1738, federal courts apply the res judicata principles of the jurisdiction rendering the prior judgment whose preclusive effect is asserted. Therefore, the preclusive effect of a federal judgment in a diversity case is governed by federal law. *In re Energy Cooperative*, 814 F.2d 1226, 1230 (7th Cir. 1987), *cert. denied*, 484 U.S. 928 (1987).

There can be no question that final judgment was rendered by this court on the plaintiff's claims. Disposition by summary judgment is as final and conclusive as judgment after trial, and it should be deemed final judgment for res judicata purposes. The factual and legal issues regarding the bar of the statute of limitations were before this court repeatedly for over a year in Ritchey I. This court determined that all causes of action alleged in Ritchey I arose from the alleged violation of plaintiff's right to be free from personal injury and were governed by the one year limitations period. The court further concluded that plaintiff's complaint was time-barred because plaintiff suspected or should have suspected that his alleged injuries were caused by Halcion more than one year prior to filing his initial complaint on March 12, 1990. The judgment in Ritchey I was affirmed by the Ninth Circuit Court of Appeals.

The complaint in Ritchey II names the same defendant as the previous suit, Upjohn. In Ritchey I, plaintiff essentially asserted that his use of Halcion caused him to suffer various psychological and physiological effects such as depression, paranoia, insanity, and hallucinations. Plaintiff alleges the same injuries in his new complaint. Plaintiff also alleges the same acts by defendant Upjohn caused the injuries, except that more acts were alleged in the previous complaint than are alleged here.

"A cause of action does not consist of facts, but the unlawful violation of a right which the facts show." *McClain v. Apodaca*, 793 F.2d 1031, 1033, note 3 (9th Cir. 1986). Plaintiff's right to be free from personal injury is at the root of both actions. Similarly, both complaints allege that plaintiff's injuries arising from his use of Halcion

were somehow caused by defendant Upjohn. Therefore, the underlying cause of action for both complaints is identical. A federal court may apply res judicata to a prior summary judgment granted by a federal court on the ground that the action is barred by the statute of limitations. *Salveson v. Western States Bankard Ass'n*, 731 F.2d 1423, 1429 (9th Cir. 1982).[1] A final judgment has already been rendered on the causes of action set forth in plaintiff's new complaint. Thus, it is barred by the doctrine of res judicata.

Plaintiff contends in his motion to remand that Ritchey II is not barred by res judicata because conspiracy and pure economic fraud were not at issue in the prior action. Plaintiff is merely attempting to allege new legal theories to recover for violation of the same primary right. A subsequent action advancing a different legal theory based on the same events and injuries is barred by a final decision in the first action where that theory could have been argued as an alternative or additional ground for recovery. *Salveson v. Western States Bankard Ass'n*, 525 F.Supp. 566, 582 (N.D. Cal. 1981), aff'd in part, rev'd in part, 731 F.2d 1423 (9th Cir. 1982). Plaintiff's fraud cause of action consists solely of allegations made in Ritchey I. The allegations in plaintiff's "common law conspiracy" claim are identical to those contained in his "common law civil conspiracy" claim in Ritchey I.[2] Regardless of the

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[1] *Salveson* was superseded by statute on other grounds, as noted in *Etheridge v. Harbor House Restaurant*, 861 F.2d 1389 (9th Cir. 1988).

[2] This court dismissed plaintiff's prior conspiracy claim with leave to amend his complaint. Instead, plaintiff pursued

legal theory used to obtain recovery, plaintiff's claims arising out of his use of Halcion are barred by the doctrine of res judicata.

While plaintiff contends that he has recently discovered information to support his new complaint, "additional evidence of the same wrongful conduct and injury is not tantamount to a new right of action." *Salveson*, 525 F.Supp. at 583. This is especially true where plaintiff "knew enough to allege fraud" in the first suit. *Id.*

The fact that defendants Dement and Stanford were not named parties in Ritchey I does not affect their ability to assert that the new action is barred as to them. Once a plaintiff suspects or should suspect "wrongdoing," the limitations period commences to run as to the universe of potential defendants. *Bristol-Myers Squibb Company v. Superior Court (Carol Jones)*, 32 Cal.App.4th 959, 964 (1995). Therefore, plaintiff's claims against defendants Dement and Stanford relating to their alleged role in plaintiff's use of Halcion are also barred by the one-year statute of limitations.

IV. ORDER

For the foregoing reasons, the court grants defendants' motions to dismiss.

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the fraud claim and did not amend his conspiracy claim further in the previous action.

DATED: 9/6/96

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

Copy of Order mailed on 9/9/96 to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOE B. RITCHEY, Plaintiff, v. THE UPJOHN DRUG COMPANY, WILLIAM DEMENT, and DOES 1 through 10, Defendants.	NO. C-96-20067 RMW ORDER DENYING PLAINTIFF'S MOTION TO REMAND (Filed Sep. 9, 1996)

Defendant Upjohn removed this action from the Santa Cruz Superior Court on January 29, 1996 on the basis of diversity jurisdiction. Plaintiff filed a timely motion to remand the action to state court. The court has read the moving and responding papers and heard the argument of counsel. For the reasons set forth below, the court denies plaintiff's motion to remand.

I. BACKGROUND

This court entered judgment against plaintiff in a prior, essentially identical action on October 26, 1993. *Ritchey v. Upjohn*, D.C. No. Civ. 92-20208 RMW (N.D. Cal. 1993) aff'd No. 9415171 (9th Cir. 1995) ("Ritchey I"). Plaintiff appealed that judgment to the Ninth Circuit Court of Appeals after filing the present action in Santa Cruz Superior Court on January 3, 1994 ("Ritchey II"). However, he made no attempt to serve or notify Upjohn of Ritchey II until he mailed Upjohn a copy of the summons and complaint on December 29, 1995. Defendant

Upjohn claims that it received a copy of the complaint on January 9, 1996. Defendant Upjohn filed a notice of removal to this court on January 29, 1996. Plaintiff then filed a timely motion to remand the action to state court on February 27, 1996. Stanford Health Services filed a "Joinder In Notice of Removal of Action" on March 5, 1996.[1]

II. DISCUSSION

A. WAS REMOVAL TIMELY?

Plaintiff contends that defendants' removal was untimely because of the one-year restriction in the second paragraph of 28 U.S.C. section 1446(b). Section 1446(b) provides:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained

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[1] Defendant Stanford Health Services was sued as Stanford Sleep Disorders Clinic and claims it was never properly served.

> that the case is one which is or has become removable, *except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action*. (Emphasis added).

Essentially, plaintiff contends that the statute should be construed narrowly against removal by reading the last clause of section 1446(b), which contains the one-year restriction, as being applicable to both paragraphs of the subsection. Removal of any diversity case would then be barred after one year, regardless of whether the case was initially removable or later became removable on the basis of something other than the initial pleading.

Defendants contend that the one-year limit in section 1446(b) only applies to diversity cases removed pursuant to the second paragraph of the section (those removed on the basis of something other than the initial pleading). In accordance with the first paragraph of the statute, defendants filed the petition for removal within 30 days after they were served with the original complaint. Therefore, defendants claim that removal was timely and that the second paragraph of 1446(b), including the one-year restriction, does not apply.

The Ninth Circuit Court of Appeals has not addressed the issue of whether the one-year limitation on removal applies only to cases covered by the second paragraph of 1446(b), or to all removed diversity cases. The district court decisions are in conflict on this issue.

Defendants heavily rely on *Zogbi v. Federated Dept. Store*, 767 F.Supp. 1037 (C.D.Cal. 1991) in support of their

position. The court finds the reasoning of *Zogbi* persuasive and agrees with its result. In *Zogbi*, the plaintiff filed suit in state court in California and then waited almost three years before serving two California defendants. A third, non-resident defendant was not properly served, but received a copy of the complaint at the same time. The non-resident defendant promptly removed the case to federal court on the basis of diversity jurisdiction, but the plaintiff attacked the removal as improper because it was done more than one year after the commencement of the suit.

The *Zogbi* court held that the one-year restriction clause in the second paragraph of 1446(b) does not apply to cases which are removable upon receipt of the initial pleading.[2] *Id.* at 1042. Using the principles of statutory interpretation, the court reasoned that the "except that . . . " clause only limits the availability of removal on the basis of something other than the initial pleading. *Id.* at 1039. This conclusion is supported by the structure of the statute, i.e., the separation of the two sentences into distinct paragraphs. The "except that . . . " clause cannot reasonably be read as also modifying the first paragraph of section 1446(b). *Id.* The first paragraph appears to state the general rule, while the second paragraph states a specific exception. In fact, section 1446(b) was composed solely of the first paragraph until the second paragraph was added in 1949. *Kaneshiro v. North American Company for Life and Health Insurance*, 496 F.Supp. 452, 460 (D.Haw. 1980). The court further stated that if Congress intended

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[2] The court also held that the California defendants were fraudulently joined.

to prevent removal in all diversity cases commenced more than one year prior to removal, Congress could have worded the statute to accomplish that result. *Zogbi*, 767 F.Supp. at 1039-40.

In addition to the principles of statutory interpretation, the legislative history of section 1446(b) also supports the conclusion that the one-year limitation only applies to cases removed pursuant to the second paragraph of section 1446(b). Congress was concerned "with removal of cases commenced in state courts that had progressed towards trial." *Id.* at 1040 (citation omitted). However, when cases are timely removed by defendants after they are initially served, there is normally no delay or disruption of the proceeding. In the present case, no action has been taken in the state court and removal will not create any delay or frustrate the intentions of Congress.

Moreover, application of the one-year limit to the first clause of section 1446(b), where it does not appear, would encourage plaintiffs to delay service, therefore preventing removal on the basis of diversity jurisdiction. Although removal statutes have historically been strictly construed, this court does not believe that Congress intended that a plaintiff could unilaterally defeat a defendant's removal right by deliberating delaying service.

The court recognizes that authority exists that supports plaintiff's position, namely that the one-year limitation provides an outside limit for removal even if none of the defendants has received notice of the action through service or otherwise within a year of its filing. Plaintiff primarily relies on three district court cases from this

circuit in which removal was barred because more than one year had passed since the action commenced: *Rezendes v. Dow Corning Corp.*, 717 F.Supp. 1435 (E.D.Cal. 1989), *Hom v. Service Merchandise Co.*, 727 F.Supp. 1343 (N.D.Cal. 1990), and *Perez v. General Packer, Inc.*, 790 F.Supp. 1464 (C.D.Cal. 1992).

In *Hom*, the court was faced with a removal based on an amended pleading. The *Hom* court looked only at the language of section 1446(b). The court did not examine the structure of the section, nor did it consider the legislative history behind it.

In *Rezendes*, the court instructed plaintiff to file a motion to remand the action in light of several procedural irregularities in the removal. While the court did consider the language and legislative history of section 1446(b), it did not consider the fact that the section is divided into two distinct paragraphs. The *Rezendes* court relied heavily on the general policy of strict construction against removal. This court is not persuaded by the *Rezendes* court's broad reading of the section and its legislative history and respectfully disagrees with its decision. The legislature was concerned with changing the forum of actions which had progressed in the state court which is what normally will have occurred in the type of cases described in the second paragraph of section 1446(b), the paragraph to which the one-year limitation logically applies. Substantial progress will not have been accomplished in cases like the present one and most of those described in the first paragraph of section 1446(b).

Perez involved the somewhat unusual situation in which the complaint was amended after service of the

two original diverse defendants (who plaintiff decided not to pursue) to name two foreign defendants. The court held that the removal by the two foreign defendants was barred because it was accomplished more than one-year after the action was commenced. *Perez* suggests that applying the one-year limit to both paragraphs of section 1446(b) preserves comity between state and federal courts. As discussed above, this court does not believe comity is normally threatened by the type of cases addressed in the first paragraph of section 1446(b). Further, it seems illogical that Congress would give a defendant a right to remove which could be defeated by the unilateral action of a plaintiff taken without notice to, or the knowledge of, the defendant.

The basis for removal of this action was ascertained from the initial pleading, and the notice of removal was filed within thirty days after defendants' receipt of the initial pleading. Since the court does not find that the one-year limitation as stated in the second paragraph of section 1446(b) applies to diversity cases removed on the basis of the initial pleading, the court finds that the removal of this action was timely.[3]

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[3] At least one court has held that the one year limitation is not triggered if the plaintiff does not attempt in good faith to serve the complaint. *Greer v. Skilcraft*, 704 F. Supp. 1570 (N.D. AL. 1989). However, it appears that in California an action is commenced when it is filed. Nevertheless, under the circumstances here, a good argument could be made that plaintiff should be estopped from objecting to removal on the basis that removal was not timely. Plaintiff filed Ritchey II knowing that defendant Upjohn had previously removed Ritchey I. He then delayed giving any notice of Ritchey II to defendant even though he knew that defendant would

B. WAS REMOVAL PROPER?

Under 28 U.S.C. section 1441, removal is authorized in any civil action brought in a state court of which the federal district courts have original jurisdiction. The federal courts have original jurisdiction of civil actions where the matter in controversy exceeds the sum of $50,000 and is between citizens of different states pursuant to 28 U.S.C. section 1332.

Plaintiff contends that the presence of defendant Dement and the served Doe defendants destroys diversity. Defendants argue that Dr. Demerit and Stanford, both California residents, have been fraudulently joined and their citizenship should be disregarded for the purposes of determining if diversity jurisdiction exists.[4] Fraudulent joinder of parties exists where there is no reasonable basis in fact or colorable ground to support the claim against the joined defendant. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 98 (1921); *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987).

Defendants argue that plaintiff has no colorable claim against defendants Dement and Stanford because the

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undoubtedly want to remove. The court, however, does not need to reach the issue of estoppel, since it has found that removal was timely under the first paragraph of section 1446(b).

[4] Under 28 U.S.C. § 1446(a), all defendants in a state action must join in a petition for removal, except for nominal, unknown, or fraudulently joined parties. This rule only applies, however, to defendants properlyjoined and served in the action. *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1193 n.1 (9th Cir. 1988).

allegations against them are barred by the statute of limitations.

On November 1, 1993, this court entered judgment against plaintiff in Ritchey I. *Ritchey v. Upjohn*, D.C. No. Civ. 92-20208 RMW (N.D. Cal. 1993) aff'd No. 94-15171 (9th Cir. 1995). This court concluded that personal injury arising from the ingestion of Halcion was the gravamen of plaintiff's complaint and, thus, the one-year statute of limitations applied. The court found that plaintiff was on notice of his claims arising out of his use of Halcion more than a year before he filed his complaint, and the case was dismissed. The judgment against plaintiff was affirmed by the Ninth Circuit upon appeal.

Ritchey II was filed in state court in January 1994. The complaint in Ritchey II arises from the same alleged injuries and damages as in Ritchey I. Nearly all of the Ritchey II complaint was copied verbatim from the fraud and conspiracy causes of action in Ritchey I. *See* Exhibit EE to Declaration of Annette C. W. Hughes in Opposition of Plaintiff's Motion to Remand to State Court. Plaintiff attempts to distinguish his claims in Ritchey II by calling them "direct fraud," "economic fraud," and "pure fraud." However, plaintiff is merely attempting to allege new legal theories to recover for violation of the same primary right at issue in the prior action: the right to be free from personal injury. Regardless of the legal theory used to obtain recovery, plaintiff's claims arising out of his use of Halcion are barred by the one-year statute of limitations.

The fact that defendants Dement and Stanford were not named parties to Ritchey I is irrelevant. Once a plaintiff suspects or should suspect "wrongdoing," the limitations period commences to run as to the universe of potential defendants. *Bristol-Myers Squibb Company v. Superior Court (Carol Jones)*, 32 Cal.App.4th 959, 964 (1995). Therefore, plaintiff's claims against defendants Dement and Stanford relating to their alleged role in plaintiff's use of Halcion are also barred by the one-year statute of limitations.

The previous judgment conclusively determined that plaintiff's entire cause of action, regardless of the alleged theory of recovery, was time-barred. Plaintiff cannot now relitigate his claims and is bound by this court's prior judgment. Because he cannot support a claim against defendants Dement and Stanford, this court finds that they have been fraudulently joined and diversity jurisdiction is not destroyed by their presence. If a nondiverse party is found to have been "fraudulently joined," it may be dismissed and ignored for purposes of determining whether the case was properly removed to federal court. *McCabe v. General Foods Corp.*, 811 F.2d 1336 (9th Cir. 1987).

IV. ORDER

For the foregoing reasons, the court denies plaintiff's motion to remand.

DATED: 9/6/96

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

Copy of Order mailed on 9/9/96 to:

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE B. RITCHEY, Plaintiff-Appellant, v. UPJOHN DRUG COMPANY; WILLIAM DEMENT, Defendants-Appellees.	No. 96-17014 D.C. No. CV-96-20067-RMW ORDER DENYING THE PETITION FOR REHEARING AND REJECTING THE SUGGESTION FOR REHEARING EN BANC (Filed May 27, 1998)

Before: HUG, Chief Judge, FERNANDEZ, and THOMAS, Circuit Judges.

The panel has unanimously voted to deny the appellant's petition for rehearing. The suggestion for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

In Pro Per
JOE B. RITCHEY - Bar No. 52130
1088 La Madrona Drive
Santa Cruz, CA 95060
(408) 426-6863

SUPERIOR COURT STATE OF CALIFORNIA

COUNTY OF SANTA CRUZ

JOE. B. RITCHEY, Plaintiff v. THE UPJOHN DRUG COMPANY, William Dement and DOES 1 through 10, Defendants _____/	CASE NO. 128370 COMPLAINT FOR DAMAGES AND RECOVERY BASED UPON FRAUD AND CONSPIRACY TO COMMIT FRAUD (Filed Jan. 3, 1994)

NOW COMES the Plaintiff, In Pro Per, and alleges the following as theories of recovery and causes of action:

FIRST CAUSE OF ACTION

Fraud and Intentional Misrepresentation

1. This complaint alleges violations of and recovery under California statutes and case law against a California resident and the Upjohn Drug Company, a Corporation with its principal place of business in Kalamazoo, Michigan. It also alleges violations of and recovery under state laws and federal statutes as to the Upjohn Drug Company, William Dement, various of its employees, agents and directors and "independent researchers and

clinicians." The names of its employees, agents and directors who joined with Defendant Upjohn to defraud and deceive the Food and Drug Administration and the consuming public, by submitting incomplete, misleading, and false data in violation of the Federal Food, Drug and Cosmetic Act, are unknown to this Plaintiff who will seek leave to amend once the identities of said co-conspirators and participants are discovered.

2. Plaintiff is a resident of Santa Cruz, California and, following doctors' recommendations and prescriptions ingested the drug Halcion, manufactured and distributed by the Upjohn Drug Company.

3. All Defendants', except the Upjohn Drug Company, and William Dement, names are unknown at this time and thus sued as fictitious defendants.

4. The relief sought herein is for general and specific compensatory damages, treble damages, punitive damages as allowed under California Statutory and Case Law.

5. The relevant times of wrongful conduct and conspiracy the Upjohn Drug Company, William Dement, its employees, agents and directors, commenced with its first violation of the Food and Drug Cosmetic Act and continues to the present date as a conspiracy and scheme to devise, conduct and arrange concealment of, nondisclosure of, and misrepresentations of, the side effects and efficacy of the drug Halcion and to commit a fraud and deceit upon the FDA, the consuming public, Halcion users, and this Plaintiff specifically.

6. In its scheme, the Defendant Upjohn Company, William Dement, certain of its employees, agents and directors, have carried out illegal and corrupt acts and continue to do so for the purpose of economic gain and to avoid civil and criminal penalties. Said Defendants have striven to conceal their civil and criminal liability and illegal acts under various federal statutes and promulgated regulations and Plaintiff has just discovered a portion of them within the last 18 months and had not suspected any of them prior to a date on or about September/October 1991.

7. Based upon information and belief this Plaintiff alleges that Defendant Upjohn Company is a multinational corporation with yearly gross revenues exceeding $2,000,000,000 (Two Billion Dollars) per year, whose principal business is the design, manufacture, and distribution for public use of medical drugs for use by prescription and purchase over the counter.

8. Commencing in a date yet undetermined in the 1970's, Defendant Upjohn, certain of its employees, agents and directors, began work to develop a new form of Benzodiazepine, specifically Triazolam, for company patent and tradename registration. As testing progressed, undesirable side effects were noticed which to reasonable unbiased observers would have raised concerns of the safety and efficacy and need for such a new form of sleeping aid.

9. As a scheme to capture a large market share of the sleeping aid market, Defendant Upjohn, William Dement, certain of its agents, employees and directors, commenced their conspiracy to, through use of economic

corruption and other means, withhold studies; misrepresent studies; select favorable investigators, clinicians, and monitors; adapt and continue to represent as true, false and fraudulent data; to coerce and threaten in attempts to suppress reasonable discussion of the safety of its product, Halcion; and to unreasonably and unprofessionally use the legal process against critics and injured claimants seeking compensation for damage caused by the drug Halcion.

10. The acts of Defendant Upjohn, William Dement, certain of its agents, employees and directors, relating to the creation, development, testing, distribution and sales of Halcion, represent a general manner of doing business by said Defendants.

11. In seeking FDA approval for Halcion, Defendant Upjohn, acting through certain of its corrupt agents, employees and directors, submitted protocol summaries and data, knowing them to be incomplete, false and misleading, and in seeking to represent the drug's safety and efficacy, represented as true certain protocol studies and results, knowing them to be false, fraudulent and to have been rejected by the FDA.

12. Defendant Upjohn, William Dement, certain of its agents, employees and directors, knowingly undertook a course of conduct to conceal, minimize and silence warnings and concerns about the drug's safety, knowing that FDA approval caused the public to believe in Halcion's relative safety and efficacy. During all said times Upjohn and William Dement had knowledge of serious adverse undisclosed side effects and underreported the

frequency of previously disclosed side effects and discounted and minimized adverse reactions, knowing them to be serious adverse experiences of which the public would want to have knowledge in selecting which product to rely upon as a sleep aid.

13. Defendant Upjohn and William Dement, at the time of seeking FDA approval, knew of its duty to fully and fairly report adverse side effects and to select investigators who would fairly and without a bias study the drug and present findings. For the purpose of economic gain and competitive advantage, Upjohn failed to select investigators, sub-investigators, clinicians and monitors who had a neutral bias and lacked an inclination to favor Upjohn. Defendant Upjohn and William Dement failed to fully and fairly present study summaries and data to the FDA and, with a purpose of playing upon the subconscious of consumers, selected a trade name for its drug to calm concern of adverse reactions, to equate drug usage with peacefully, untroubled, happy and tranquil experiences, and, knowing it to be otherwise, represented that usage of the drug would lead to "golden, peaceful, tranquil" moments.

14. Acting in the conspiracy above described, Upjohn and William Dement violated civil statutes and regulations, failed to fully and fairly study the drug for the purpose of avoiding the confirmation of troubling reports of adverse reactions to its misnamed drug, violated statutes and regulations calling for objective and unbiased review of all drugs submitted to the FDA, failed to reasonably notify its intended market of the potential hazards and dangers of Halcion usage, all the while intending that the select market population of potential

consumers would remain ignorant of adverse reactions to and/or potentially dangerous side effects stemming from use of the drug.

15. Commencing in 1983 Plaintiff was prescribed Halcion in dosages of 0.25 mg and 0.5 mg, purchased and obtained, used and ingested said Halcion tablets as intended by the manufacturer and as prescribed, such use being consistent with guidelines set by the Upjohn Drug Company and William Dement, and as intended and foreseen by said Defendant. At the time of ingestion of the tablets, the medication was pure and unadulterated and as originally manufactured by Upjohn.

16. Commencing on or about January 1984, and periodically to 1988, Plaintiff suffered, as a result of ingestion of Halcion, confusion, anxiety, nervousness, restlessness, fear of cancer and loss of health, clouding of cognition, and other untoward reactions. Commencing in May 1984 and periodically thereafter, Plaintiff ingested a dosage table of 0.5 mg exclusively to aid in his sleep. As a direct result of the 0.5 mg dosage, Plaintiff experienced a bewildering and bizarre series of reactions, including paranoia; severe clouding and cessation of thought; delusions; hallucinations; depthless severe depression; feelings of insanity; fear of insanity and of attack; panic; loss of health; profound fears of cancer, death and impending doom; worthlessness of life; thoughts of life termination; aggression; detachment from reality; and other unexpected uncounseled reactions.

17. As a direct and proximate result of the above described reactions and induced states, Plaintiff undertook a series of actions which culminated with his arrest

for serious crimes, loss of income, caused pain and suffering to the Plaintiff, general and specific damage to Plaintiff, loss of freedom, profession, and esteem, and resulted in extreme anguish, grief and loss.

18. As a direct and proximate result of the above described reactions and induced states, Plaintiff incurred costs and expenses and economic losses in excess of $1,000,000 and has sustained lasting and permanent diminution of his earning potential.

19. At all times relevant to the above conduct of Upjohn and William Dement and of loss to the Plaintiff, DOES I through 10 were employees, agents, consultants and directors of Upjohn and William Dement, acting in concert with and within the scope, course, and confirmed authority of Upjohn and William Dement.

20. As a direct and proximate result of the conspiracy of suppression and silence as above stated, Plaintiff did not have reason to believe nor to reasonably suspect fraud and conspiracy to commit fraud by Defendant Upjohn Company, William Dement, certain of its employees, agents, consultants and directors, until late 1991.

21. As a direct and proximate result of the acts of Defendants, and each of them, Plaintiff has incurred and will continue to experience loss of income, wages, costs, other pecuniary damages, pain, suffering, distress, anguish, and other loss and damages of both a specific and general nature, in an extent not yet known to Plaintiff. Leave is requested to amend this complaint to conform to proof at the time of trial.

22. Having such knowledge, or having cause to have such knowledge, Upjohn, William Dement, DOES 1 through 5, intentionally and knowingly failed to warn Plaintiff or any other target user of the hazards and dangers of the ingestion of such formulation of Halcion. Knowing that a substantial segment of the intended user population was likely to develop, suffer, or experience serious adverse reactions, consequences, and results, and, after reasonable notice of the actual hazards and dangers, said Defendants, and each of them, concealed and suppressed the mounting evidence of such hazards and dangers.

23. The above acts of concealment and suppression were accompanied by disinformation, misrepresentation, deceit and fraud upon the public and FDA, with the intent to delay any and all adverse publicity that would detract from Defendants promotion and sales of Halcion. Said Defendants, and each of them, knew reports of adverse reactions, untoward and bizarre experiences, health threatening consequences, would negatively impact marketing and sales, and deter a significant market segment from purchase and use of said product.

24. At all times herein mentioned Defendant Upjohn Company, William Dement and DOES I through 10, inclusive, knew that the drug Halcion, manufactured and sold as a 0.25 mg and 0.5 mg tablet, was defective in the manner herein above pled, and that such defect unreasonably exposed the consuming public to personal injury of a serious and profound nature and, yet notwithstanding this knowledge, intentionally, willfully and consciously, and in knowing disregard of the safety of such persons and the Plaintiff herein, refrained from giving

effective and proper notice of the defect to the purchasers, placed and persisted in placing its defective product into the stream of commerce, knowing and desiring that the consuming purchaser would purchase said product in its defective condition.

25. Commencing on or about the time Upjohn first applied to the FDA for marketing approval of its drug Halcion, Defendant the Upjohn Company, and William Dement, and DOES I through 5, falsely and fraudulently represented the true consequences and reactions to Halcion. At said time and following through the manufacturing, marketing, and distribution for sale of the drug Halcion, the Defendant Upjohn Company, William Dement and DOES I through 5 inclusive, had knowledge that the drug caused potentially dangerous side effects of an undisclosed nature, had a significant propensity to cause health threatening reactions of a serious and profound nature, and to otherwise wreak adverse consequences upon the consuming public.

26. By submitting false and misleading information concerning Halcion to the FDA, the Upjohn Company, William Dement and DOES 1 through 5 inclusive, represented Halcion as reasonably safe for its intended use, knowing said representations would be more likely to procure approval of the drug than would disclosure of true and unbiased studies, opinions, and investigations, and of the true foreign marketing experience theretofore observed with the drug Halcion.

27. When Defendant Upjohn Company, William Dement and DOES 1 through 5 inclusive, made such representations to the FDA they knew them to be false

and knowingly made said representations with the intent to deceive, mislead, and defraud the FDA and consuming public, with the intent to induce the consuming public to rely upon FDA approval obtained through unethical, unprofessional, unscientific, biased and slanted reports, investigations, and summaries.

28. Plaintiff, at the time of purchase and ingestion of the 0.25 mg and 0.5 mg dosage, was ignorant of the deceitful nature of Defendants' conduct, was ignorant of the falsity of the representations, and of the false pretenses used to obtain FDA approval. Plaintiff reasonably relied upon FDA approvals had and obtained through deceitful, dishonest, intentionally wrongful means. Had Plaintiff known the true, actual facts, Plaintiff would not have purchased nor consumed said drug.

29. The said representations by Defendant Upjohn Company, William Dement and DOES 1 through 5 inclusive, were knowingly false in that said Defendants had received reports, letters, and data directly recounting adverse, untoward, dangerous, and adverse profound reactions to and experiences with the drug Halcion, and had chosen to ignore the reasonable need for clarifing investigations and research into said product, deciding to use the consuming public as its research experimental base, all for the purposes of economic gain and competitive advantage.

30. The aforementioned conduct of Defendant Upjohn, William Dement and DOES 1 through 5 inclusive, was intentional misrepresentation, knowing deceit, concealment and distortion of material facts, and having scienter and knowledge, said Defendants continued their

despicable conduct having reasonable notice that said conduct and wrongful acts would subject Plaintiff and the consuming public to cruel and unjust hardships. Said acts were taken in conscious disregard of the rights of the public, the rights of Plaintiff, and in knowing disregard of the statutory and administrative regulations promulgated to protect the consuming public from dangerous and/or unsafe drugs.

31. Commencing at a time on or about the first sale of the 0.5 mg and 0.25 mg tablet, Defendant Upjohn Company, William Dement and DOES 1 through 5, falsely and fraudulently represented to medical practitioners and the public, by means of articles in newspapers, trade journals, medical journals, magazines, pamphlets, and notices, with the intent to induce the public to purchase Halcion, that Halcion was a safe and effective drug to be used as a sleep aid, having benefits and efficacy superior to those of similar products. In truth and in fact, said representations were false, deceitful and made with a knowing disregard of the truth for the purposes of economic gain and competitive advantage

32. As a proximate and direct result of the above stated despicable acts by Defendants, and each of them, Plaintiff has been injured in the manners above stated.

Wherefore, Plaintiff prays for judgement as hereinafter pled.

SECOND CAUSE OF ACTION

Common Law Civil Conspiracy

33. Plaintiff incorporates and realleges as set forth herein all preceding paragraphs.

34. Plaintiff is informed and believes, and thereupon alleges that at all times relevant to this action, commencing on or about the preparation of IND safety reports concerning the drug Halcion, Defendants the Upjohn Company, William Dement and DOES I through 10, composing employees, agents, consultants, investigators, and attorneys, commenced a conspiracy and concert of action wherein each said party acted as a conspirator and/or co-conspirator within the course and scope of said conspiracy.

35. At or about said time, Defendants, and each of them herein mentioned, knowingly and willfully conspired and agreed amongst themselves to misrepresent the true nature, dangers, hazards, and risks associated with the drug Halcion, especially at its formulated dosages of 0.5 mg and 0.25 mg.

36. Acting in concert and with the consent of one another, and in furtherance of the conspiracy and above alleged agreement, Defendants Upjohn, William Dement and DOES 1 through 10 assisted the NPPT/Worldwide Halcion Committee to further the conspiracy and to continue its wrongful purpose, conspiring unlawfully to prevent and working to hinder the submission of full, complete and unbiased information to the FDA, to misreport protocol results, to select biased and favorable

investigators, to suppress the dissemination of information reasonably disclosing the risks, hazards, and consequences of the usage of Halcion, and to otherwise carry out an illegal conspiracy and agreement to mislead, deceive and defraud the FDA, the general public, and the consumer of the drug Halcion, including Plaintiff herein.

37. Having a duty prescribed by statute and administrative regulation, said conspirators designed a course of conduct to delay and/or prevent the dissemination of reports of adverse consequences, reactions, and experiences with the drug Halcion which would have alerted the consuming public, the FDA, and the health practitioner, of the true hazards, risks, and dangers of the specified drug, especially in its 0.5 mg and 0.25 mg tablet size, and to further prevent and/or delay the disclosure of information tending in any manner to lessen the size of the prescribed dosage and/or to decrease the length of the term and use of Halcion.

38. Said acts were taken for the purpose of economic gain, with the expectation of economic reward, for the purposes of employment and gaining an economic and competitive advantage over competing products with a similar efficacy but less propensity for untoward experiences, adverse reactions, dangerous side effects, and having a market experience associated with fewer side effects compared with the same advantages.

39. In doing the things herein alleged, Defendants, and each of them, acted willfully and intentionally, knowing the significant likelihood of serious injury to a substantial part of the consuming public. Defendants acted and carried out their fraud knowing that a reasonable

dissemination of the true facts relating to the usage of Halcion and its adverse effects would seriously impact the economic gain and competitive advantage achieved as a result of the acts performed in furtherance of the conspiracy.

40. Plaintiff is informed and believes, and thereupon alleges, that the last overt act in pursuance of the above described conspiracy has not yet taken place and that said Defendants continue to conspire, act in concert, and to join together to achieve the purpose of denying to the FDA and the consuming public reports of the true and unbiased facts relating to the usage of Halcion, to the inadequacies of the warnings, labeling and counseling of adverse reactions, untoward experiences, dangerous and life threatening experiences, and unexpected occurrences relating to the usage of Halcion.

41. Plaintiff had no reasonable means of obtaining knowledge of the conspiracy and the unity of action undertaken by said Defendants, and each of them, in the furtherance of their conspiracy and efforts to conceal, defraud, and suppress the true facts relating to the usage of Halcion, and only began a suspicion of said conspiracy, unity of action, joint purpose, and association sometime after September/October of 1991.

42. As a proximate and direct result of the above stated despicable acts by Defendants, and each of them, Plaintiff has been injured in the manners above stated.

Wherefore, Plaintiff prays for judgement as follows:

FIRST CAUSE OF ACTION
Fraud and Intentional Misrepresentation

1. For general and special damages according to proof.

2. For costs of suit.

3. For reasonable attorney's fees as deemed just and proper according to proof.

4. For any Court imposed restrictions which may be appropriate on future conduct or activities

5. For damages sufficient in an amount to punish these Defendants referenced herein and for damages sufficient to serve as a deterrent from the same or similar conduct by this and other business entities in this or related fields of economic endeavor.

6. For such other damages and relief that the Court may deem just and proper, including pre- and post-judgment interest found appropriate by the Court.

And for further relief Plaintiff prays:

SECOND CAUSE OF ACTION

Common Law Civil Conspiracy

1. For general and special damages according to proof.

2. For costs of suit.

3. For reasonable attorney's fees as deemed just and proper according to proof.

4. That appropriate general and special damages, losses, costs and fees be trebled in accordance with relevant law.

5. For any Court imposed restrictions which may be appropriate on future conduct or activities

6. For damages sufficient in an amount to punish these Defendants referenced herein and for damages sufficient to serve as a deterrent from the same or similar conduct by this and other business entities in this or related fields of economic endeavor.

7. For such other damages and relief that the Court may deem just and proper, including pre- and post-judgment interest found appropriate by the Court.

And for further relief Plaintiff prays:

_____ _____

Joe Burris Ritchey Date

_____

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE B. RITCHEY, Plaintiff-Appellant, v. UPJOHN DRUG COMPANY, a Delaware corporation, Defendant-Appellee.	No. 94-15171 D.C. No. CV-92-20208-RMW P MEMORANDUM* (Filed June ___, 1995)

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Submitted June 6, 1995**

Before: O'SCANNLAIN, LEAVY, and HAWKINS, Circuit Judges.

Joe B. Ritchey appeals the district court's summary judgment for defendant Upjohn Drug Company ("Upjohn") based on the statute of limitations in his personal injury diversity action. Ritchey alleged that he

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, the parties' requests for oral argument are denied.

suffered injury as a result of his ingestion of the prescription medication Halcion. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.[1]

We review de novo the district court's ruling on the appropriate state statute of limitations. *F.D.I.C. v. McSweeney*, 976 F.2d 532, 534 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2440 (1993). "While resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper." *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1112 (1988).

Under California Civil Procedure Code § 340(3), "any action for personal injuries . . . must be brought within one year of its accrual." *Ward v. Westinghouse Can. Inc.*, 32 F.3d 1405, 1407 (9th Cir. 1994). While an action generally accrues on the date of injury, "under the California delayed discovery rule, 'the accrual date of a cause of action is delayed *until the plaintiff is aware of her injury and its negligent cause.*' " *Id.* (quoting *Jolly*, 44 Cal. 3d at 1109). Specifically, "the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing [and/or] . . . once the plaintiff has notice or information of circumstances to put a reasonable person on inquiry." *Jolly*, 44 Cal. 3d at 1110-11 (internal quotations omitted). Furthermore, "[t]o determine which statutory period applies, California courts look to the substance or gravamen of the complaint."

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[1] Accordingly, Upjohn's motion to strike is dismissed as moot.

McSweeney, 976 F.2d at 534; *see also Hensler v. City of Glendale*, 8 Cal. 4th 1, 22 (1994), *cert. denied*, 115 S. Ct. 1176 (1995).

Here, Ritchey filed suit on March 10, 1990. The district court found that no genuine issue of fact existed as to when Ritchey became suspicious of wrongdoing because (1) Ritchey's criminal appeal, filed on March 3, 1989, noted that "numerous studies have revealed that Halcion in fact induces delusions and paranoia and insanity," (2) Ritchey had called a psychiatrist in August, 1988, and asked if the psychiatrist would "talk to attorneys" about research Ritchey had done on Halcion, (3) Ritchey had sent a letter to his defense attorney dated November 4, 1988, informing him "that adverse reactions from Halcion may include 'inappropriate abnormal and bizarre behavior,' " and (4) Ritchey was sent the results of a computer search on November 3, 1988, which listed numerous articles on adverse reactions to Halcion.

Because Ritchey had "notice or information of circumstances to put a reasonable person on inquiry" over one year before filing this action, the district court correctly found that Ritchey's claims were barred by the statute of limitations. *See Jolly*, 44 Cal. 3d at 1110-11. In addition, the district court correctly applied California's one year statute of limitations because personal injury was the "gravamen" of Ritchey's complaint. *See McSweeney*, 976 F.2d at 534.

AFFIRMED

ATTORNEY OR PARTY WITHOUT ATTORNEY
(NAME AND ADDRESS): TELEPHONE:

JOE B. RITCHEY
600 Riverside Avenue
Santa Cruz, CA 95060

ATTORNEY FOR (NAME): Plaintiff In Pro Per

FOR COURT USE ONLY

(Filed Mar. 12, 1990)

RICHARD W. BEDAL, Clerk
By /s/ Illegible
Deputy
SANTA CRUZ COUNTY

Insert name of court, judicial district or branch court, if any, and post office and street address:

SUPERIOR COURT OF SANTA CRUZ COUNTY
701 Ocean Street, Room 110
Santa Cruz, CA 95060

PLAINTIFF:

JOE B. RITCHEY

DEFENDANT:

UPJOHN COMPANY
[X] DOES 1 TO 10

COMPLAINT – Personal Injury, Property Damage, Wrongful Death

[ ] MOTOR VEHICLE [X] OTHER (*specify*): Products Liability

[X] Property Damage [ ] Wrongful Death
[X] Personal Injury [X] Other Damages (*specify*): As Alleged

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CASE NUMBER:

113198

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1. This pleading, including attachments and exhibits, consists of the following number of pages: 4

2. a. Each plaintiff named above is a competent adult

[ ] **Except** plaintiff (*name*):

[ ] a corporation qualified to do business in California

[ ] an unincorporated entity (*describe*):

[ ] a public entity (*describe*):

[ ] a minor [ ] an adult

[ ] for whom a guardian or conservator of the estate or a guardian ad litem has been appointed

[ ] other (*specify*):

[ ] other (*specify*):

[ ] **Except** plaintiff (*name*):

[ ] a corporation qualified to do business in California

[ ] an unincorporated entity (*describe*):

[ ] a public entity (*describe*):

[ ] a minor [ ] an adult

[ ] for whom a guardian or conservator of the estate or a guardian ad litem has been appointed

[ ] other (*specify*):

[ ] other (*specify*):

b. [ ] Plaintiff (*name*):

is doing business under the fictitious name of (*specify*):

and has complied with the fictitious business name laws.

c. [ ] Information about additional plaintiffs who are not competent adults is shown in Complaint-Attachment 2c.

3. a. Each defendant named above is a natural person

[X] **Except** defendant (*name*):

UPJOHN COMPANY

[ ] a business organization, form unknown

[ ] a corporation

[ ] an unincorporated entity (*describe*):

[ ] a public entity (*describe*):

[X] other (*specify*): Believed to be a Michigan Corporation

[ ] **Except** defendant (*name*):

[ ] a business organization, form unknown

[ ] a corporation

[ ] an unincorporated entity (*describe*):

[ ] a public entity (*describe*):

[ ] other (*specify*):

[ ] **Except** defendant (*name*):

[ ] a business organization, form unknown

[ ] a corporation

[ ] an unincorporated entity (*describe*):

[ ] a public entity (*describe*):

[ ] other (*specify*):

[ ] **Except** defendant (*name*):

[ ] a business organization, form unknown

[ ] a corporation

[ ] an unincorporated entity (*describe*):

[ ] a public entity (*describe*):

[ ] other (*specify*):

b. The true names and capacities of defendants sued as Does are unknown to plaintiff.

c. [ ] Information about additional defendants who are not natural persons is contained in Complaint-Attachment 3c.

d. [ ] Defendants who are joined pursuant to Code of Civil Procedure section 382 are (*names*):

4. [ ] Plaintiff is required to comply with a claims statute, and

   a. [ ] plaintiff has complied with applicable claims statutes, or

   b. [ ] plaintiff is excused from complying because (*specify*):

5. This court is the proper court because

   [ ] at least one defendant now resides in its jurisdictional area.

   [ ] the principal place of business of a corporation or unincorporated association is in its jurisdictional area.

   [X] injury to person or damage to personal property occurred in its jurisdictional area.

   [X] other (*specify*): Plaintiff used defendant's medical product in Santa Cruz and that product was sold and marketed there.

6. [ ] The following paragraphs of this complaint are alleged on information and belief (*specify paragraph numbers*):

7. [ ] The damages claimed for wrongful death and the relationships of plaintiff to the deceased are

   [ ] listed in Complaint-Attachment 7

   [ ] as follows:

8. Plaintiff has suffered

[X]	wage loss	[X]	loss of use of property
[X]	hospital and medical expenses	[X]	general damage
[ ]	property damage	[X]	loss of earning capacity

[X] other damage (*specify*): Wrongful resulting criminal prosecution and conviction due to drug-induced behaviour on account of Upjohn's defective medicine. Wrongful resulting deprivation and loss of his profession as an attorney at law due to drug-induced behaviour on account of Upjohn's defective medicine.

9. Relief sought in this complaint is within the jurisdiction of this court.

10. PLAINTIFF PRAYS

For judgment for costs of suit; for such relief as is fair, just, and equitable; and for

[X] compensatory damages in an amount of at least $500,000 and

[X] **(Superior Court)** according to proof.

[ ] **(Municipal and Justice Court)** in the amount of $_____

[ ] other (*specify*):

11. The following causes of action are attached and the statements above apply to each: (*Each complaint must have one or more causes of action attached.*)

[ ] Motor Vehicle

[ ] General Negligence

[ ] Intentional Tort

[X] Products Liability

[ ] Premises Liability

[X] Other (*specify*): reserved at this time.

Dated: March 9, 1990

Joe B. Ritchey
(Type or print name)

/s/ Joe B. Ritchey
(Signature of plaintiff or attorney)

ATTACHMENT TO [X] Complaint
[ ] Cross-Complaint

(*Use a separate cause of action form for each cause of action.*)

Plaintiff (*name*): Joe B. Ritchey

Prod.L-1. On or about (*date*): A date within one year past plaintiff was injured by the following product: A sleeping pill made and marketed by defendant under the brand name HALCION.

Prod.L-2. Each of the defendants knew the product would be purchased and used without inspection for defects. The product was defective when it left the control of each defendant. The product at the time of injury was being

[X] used in the manner intended by the defendants.

[X] used in a manner that was reasonably foreseeable by defendants as involving a substantial danger not readily apparent. Adequate warnings of the danger were not given.

Prod.L-3. Plaintiff was a

[X] purchaser of the product.

[ ] bystander to the use of the product.

[X] user of the product.

[X] other (*specify*): As prescribed by his physician

PLAINTIFF'S INJURY WAS THE LEGAL (PROXIMATE) RESULT OF THE FOLLOWING:

Prod.L-4. [X] **Count One – Strict liability** of the following defendants who

a. [X] manufactured or assembled the product (*name*): Upjohn Company

[X] Does 1 to 10

b. [X] designed and manufactured component parts supplied to the manufacturer (*names*): Upjohn Company

[X] Does 1 to 10

c. [X] sold the product to the public (*names*): Upjohn Company

[X] Does 1 to 10

Prod.L-5. [X] **Count Two – Negligence** of the following defendants who owed a duty to plaintiff (*names*): Upjohn Company

[X] Does 1 to 10

Prod.L-6. [X] **Count Three – Breach of warranty** by the following defendants (*names*): Upjohn Company

[X] Does 1 to 10

a. [X] who breached an implied warranty

b. [X] who breached an express warranty which was

[X] written [ ] oral

Prod.L.7. [X] The defendants who are liable to plaintiffs for other reasons and the reasons for the liability are

[ ] listed in Attachment-Prod.L-7
[X] as follows: Unknown at this time.

TRANSCRIPT OF ___

* * *

[p. 2] FRIDAY, MAY3, 1996

THE CLERK: CALLING CASE C-96-20067, JOE RITCHEY VERSUS THE UPJOHN DRUG COMPANY, ON FOR DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM OR, IN THE ALTERNATIVE, SUMMARY JUDGMENT, AND PLAINTIFF'S MOTION TO REMAND.

MR. HEALY: GOOD MORNING YOUR HONOR. MICHAEL HEALY FOR THE UPJOHN COMPANY WITH ANNETTE HUGHES.

MS. EWERT: ELIZABETH EWERT ON BEHALF OF DEMENT AND HEALTH CARE SERVICES.

MR. RITCHEY: AND JOE RITCHEY, OF COURSE, FOR HIMSELF. GOOD MORNING.

THE COURT: BASICALLY I THINK THIS CASE PRESENTS ONE ISSUE THAT'S DIFFICULT, AND THAT IS WHAT THE LAST CLAUSE IN 1446(B) MEANS, AND OBVIOUSLY THERE ARE CASES GOING BOTH WAYS WITH THE MAJORITY OF THE CASES GOING IN FAVOR OF MR. RITCHEY'S POSITION.

HOWEVER, I MUST SAY THAT I FIND THE REASONING OF THE *ZOGBI* CASE, AND I RECOGNIZE THAT THERE'S EVEN A CASE IN THAT DISTRICT LATER THAN *ZOGBI* THAT GOES THE OTHER WAY, MORE PERSUASIVE BECAUSE IT SEEMS TO ME THAT READING IT THE WAY THAT A NUMBER OF CASES

HAVE DONE, INCLUDING A COUPLE FROM THIS DISTRICT, REALLY IS JUST NONSENSICAL.

FRANKLY, AND I MIGHT AS WELL BE TOTALLY UP FRONT WITH YOU MR. RITCHEY, I JUST, WHILE THIS CASE GOES FORWARD IN STATE COURT, I JUST DON'T THINK THERE'S A CHANCE THAT IT'S GOING [p. 3] TO GO FORWARD HERE. THE STATUTE OF LIMITATIONS WAS DETERMINED AGAINST YOU AND WENT UP ON APPEAL AND YOU LOST.

THAT'S NOT A DETERMINATION ON THE MERITS OF THE CASE, BUT IT IS A DETERMINATION OF THE STATUTE, AND ONCE YOU SUSPECT THAT YOU HAVE A CLAIM BASED ON THE INGESTION OF HALCION, I THINK IT'S CLEAR THAT THE STATUTE STARTS RUNNING AS AGAINST ALL DEFENDANTS.

I JUST THINK, UNFORTUNATELY FROM YOUR STANDPOINT, YOU'RE OUT OF LUCK, BUT I'LL BRIEFLY HEAR COMMENT.

MR. RITCHEY: THANK YOU, YOUR HONOR.

SINCE PRESIDENT REAGAN, IN 1988, APPROVED THE LEGISLATURE AMENDING 1446 (B) RESTORING TO THE STATE SOME OF THEIR RIGHTS IN DIVERSITY CASES TO APPLY THEIR OWN LAWS, NINE OF THE ELEVEN CIRCUITS HAVE REJECTED THE REASONING AND THE RESULT OF *ZOGBI*.

THE COURT: IT'S NOT REALLY NINE OF ELEVEN CIRCUITS. IT'S DISTRICT COURTS WITHIN THE CIRCUITS. I'M NOT AWARE OF ANY CIRCUIT CASE. ARE THERE –

MR. RITCHEY: THERE IS NO CIRCUIT COURT OF APPEAL CASE.

THE COURT: THAT'S WHAT I MEAN.

MR. RITCHEY: BUT THE ONLY ONES THAT HAVE CONSIDERED THE ISSUE IN DICTA HAVE REJECTED THE REASONING OF *ZOGBI*. THOSE CASES ARE CITED IN MY CLOSING BRIEF.

THE COURT: IS THERE AN APPELLATE CASE?

* * *

In Pro Per
Joe B. Ritchey – Bar No. 52130
1088 La Madrona Drive
Santa Cruz, CA 95060
(408) 426-6863

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOE. B. RITCHEY, Plaintiff, v. UPJOHN DRUG COMPANY, WILLIAM DEMENT and DOES 1 through 10, Defendants.	NO. C 96 20067 RMW NOTICE OF INTENT TO FILE PETITION FOR REMAND, NOTICE THAT CONSENT TO REMAND WAS REQUESTED AND REFUSED, and NOTICE OF REQUEST FOR SANCTIONS

To Defendants Upjohn and Dement and their attorneys of record:

PLEASE TAKE NOTICE that Plaintiff is preparing a Petition for Remand based upon:

1. Failure of Defendants to remove within one year of commencement of action; see 28 USC § 1446(b) as interpreted by *Hom v. Secure Merchandise Company*, 727 F. Supp. 343 (ND Cal. 1990) and *Perez v. General Packer*, 790 F. Supp. 1464 (CD Cal. 1992).

2. Defendant Dement is not a fraudulently joined defendant because Plaintiff can state a colorable claim

under state law against Dement, and claims against Dement are not barred by Res Judicata – *Hawkins v. Upjohn, Dement et al.*, 890 F. Supp. 606 (Texas 1994) upholding State conspiracy fraud claims against Upjohn; and *Koch v. Rodlin*, 223 Cal App. 3d (1990) 1591.

3. The lack of Diversity Jurisdiction

4. Two of the three California served defendants failed to join in Upjohn's Notice of Removal (see Proofs of Service – stapled hereto – for Stanford Sleep Research Center and Stanford Health Services.)

Attached hereto, as Exhibit 1, and incorporated herein is a copy of the Complaint filed in *Hawkins v. Upjohn* which summarizes some of the acts of William Dement in the alleged conspiracy. PLAINTIFF WILL HAVE HIS PETITION FOR REMAND ON FILE WITHIN 30 DAYS FROM JANUARY 29, 1996.

AS ADDITIONAL SUPPORT for Plaintiff's contention that a colorable cause of action may be stated against Upjohn and Dement for Conspiracy to Commit Fraud and Fraud, and that the action is not barred by Res Judicata or Collateral Estoppel, Plaintiff attaches hereto:

2. Copy of document entitled "Protocol 6048: A Falsified Study".

3. Copy of a paper entitled "A Story of Halcion".

4. Copy of Food and Drug Administration investigation of "The Upjohn Company."

5. Copy of working paper presented by Shook, Hardy and Bacon, herein co-counsel for Upjohn, entitled "Legal Liability in the Pharmaceutical Industry." Shook,

Hardy and Bacon advises: (1) that clients, including the Upjohn Drug Company, "clean their house" before allowing Plaintiff's attorneys to conduct discovery; (2) recommends their clients institute policies of "no minutes required" for meetings where adverse effects of pharmaceutical products and disclosure of same are discussed; (3) that pharmaceutical companies "follow the same philosophy that Al Capone followed, and if Geraldo kicks in your vault on national T.V., be sure that all he finds is a bunch of dusty junk, nothing that is going to embarrass you or your company, just old Geraldo;" (4) Shook, Hardy, et al. advises drug companies to every so often purge their work product and records, and that "documents don't only come from paper; they also come from computer tapes, voice mail and E-mail. Employees need to understand that a violation of a document retention policy is every bit as serious a violation of other important company policies;" and (5) recommends that drug companies conduct "scorchingly thorough" searches of company documents to "insure the paper trail represents the company's dedication to the safety of the product" and if it does not, advises the companies to create documents after the fact.

6. A copy of a memo dated August 23, 1991 indicating that "the Upjohn Company" was aware that settlement of litigation concerning injuries caused by Halcion, which required that Plaintiff's counsel return to Upjohn all documents obtained during discovery would limit and hinder investigation of drug safety by governmental agencies since they would "probably not get all of the information because of the Grunberg case settlement" and that the Upjohn Company needed to address "some

real concerns about the so-called falsified and fraudulently misrepresented, concealed and omitted data in submissions to the FDA" and that the Upjohn Drug Company was aware of "some manipulation of data by one of our people and about the involvement of this individual in other product submissions."

7. An Affidavit by a Charles R. Arledge, stating, in part, his awareness of Upjohn's knowledge concerning falsification of research data and his awareness of Upjohn's willingness to pay large sums of cash therein reported as $150,000.00, to silence participants who experienced serious adverse side effects during early Upjohn Halcion pre-market studies.

8. "Confidential Memo" dated June 17, 1988 evidencing Upjohn's awareness that information provided to governmental regulating bodies concerning Halcion was incomplete and inconsistent with the company's true data concerning Halcion, and, that as a result, the company was presenting a false impression that Halcion had a lower incidence of serious side effects than what full disclosure and truthful disclosure would otherwise present.

9. Copy of FDA working paper concluding that frequency of consumer experiences of violent and hostile adverse reaction effects of Halcion was alarmingly higher than what should be the frequency if Upjohn's data submitted for approval of Halcion had accurately measured the same.

10. Copy of FDA report concluding that adverse reactions to Triazolam (Halcion) were being experienced by the consuming public at a much higher frequency and

intensity than the medication Ritchey had been taking prior to switching to Halcion.

Sanctions are requested against Upjohn and Dement for their intentional and deceptive failure to inform this court of Plaintiff's opposition to their Removal and Request for Dismissal. Defendants have attempted to induce this court into error by representing that Plaintiff had not expressed any intent to oppose their Removal, Request for Dismissal and/or Summary Judgment. (See copies of letters to each attached hereto.) Petition for Remand within 30 days from 29 January 1996 *is opposition* to Removal and all Defendant's requested motions.

Plaintiff requests sanctions against each defendant in the amount of $1,000.00 and informs the court that Sedgwick, Detert, Moran, et al. have previously been sanctioned by a California Superior Court in the amount of $1,000.00 for said law firm's actions in representing Upjohn in the case of *Leo and Phyllis Norgart v. Upjohn, et al.*, Case no. 193265 filed in the Superior Court of California, County of Sonoma.

Respectfully submitted,

Dated: _____ _____

Joe Ritchey

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF SANTA CRUZ

I am employed in the County of Santa Cruz, California. I am over the age of eighteen years and not a party to the within action; my business address is 1088 La Madrona Drive, Santa Cruz, California 95060. On February 20, 1996, I served the following document:

NOTICE OF INTENT TO FILE PETITION FOR REMAND, NOTICE THAT CONSENT TO REMAND WAS REQUESTED AND REFUSED, AND NOTICE OF REQUEST FOR SANCTIONS (AND REFERENCED ATTACHMENTS AND EXHIBITS)

by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Cruz, California addressed as follows:

Mr. Michael F. Healy
Sedgwick, Detert, et al.
One Embarcadero Center, 17th Fl.
San Francisco, CA 94111-3765

Charles Preuss
Elizabeth Ewert
Preuss Walker & Shanagher
595 Market Street, # 1600
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed on February 20, 1996, at County of Santa Cruz, California.

_____

Sue Casey

In Pro Per
Joe B. Ritchey
1088 La Madrona Drive
Santa Cruz, CA 95060
(408) 426-6863

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOE. B. RITCHEY, Plaintiff, v. UPJOHN DRUG COMPANY, William Dement and DOES 1 through 10, Defendants.	NO. C 96 20067 RMW DECLARATION OF JOE RITCHEY IN SUPPORT OF PETITION FOR REMAND Date: May 3, 1996 Time: 9:00 a.m. Courtroom: Honorable R. Whyte

I, Joe Ritchey, state under penalty of perjury the following is true and correct:

Attached to my "Notice of Intent to Petition for Remand" are exhibits numbered 1 through 10. I did not know of nor suspect their existence prior to after summary judgement had been entered in *Ritchey v. Upjohn* C 92-20208 RMW. Prior to Upjohn's summary judgment I had no suspicion of the existence of any conspirators outside the employment of Upjohn. The Order of Bifurcation and the narrow limiting of issues before the court as a result of Upjohn's actions and the pervasive nature and effectiveness of the conspiracy to prevent discovery of

evidence, combined, foreclosed discovery of and suspicion of the frauds and conspiracies here at issue.

Attached to this declaration is Exhibit 12 (this exhibit is numbered consecutive starting with the exhibits attached to my Notice of Intent to Petition for Remand). This exhibit is a true and correct copy of an order entered by the court in *Scovish v. The Upjohn Company*, CV-93 0526520S Superior Court of the Judicial District of New London, Connecticut. This order was entered November 22, 1995. While the order "speaks for itself" it, amongst other things, states that, due to the nature of the litigation against Upjohn, no private litigant has a fair chance to conduct discovery against Upjohn "because of the astronomical number of documents involved in this case." Upjohn had therein contended that just the index and summary of documents "would number more than 100,000 pages."

In order to remove from that litigation some of the undue and unsurmountable hardship a plaintiff would face in shifting through "a warehouse" of unorganized documents (declarant has been advised by Upjohn that Halcion-related documents exceed four million pages) the court ordered that Shook Hardy and Bacon produce a copy of the index and data base compiled by them and Upjohn in their review of the Halcion-related documents.

The court in *Scovish v. The Upjohn Company* ordered release of said index and data base without having knowledge of the frauds and conspiracies of the Upjohn Company and Shook Hardy and Bacon to secrete and destroy relevant evidence as documented in Exhibits 1, 5

and 7 of those exhibits attached to my Notice of Intent to Petition for Remand.

Date	Joe Ritchey

Supreme Court, U.S.
FILED
SEP 24 1998
OFFICE OF THE CLERK

No. 98-336

In The

Supreme Court of the United States

October Term, 1997

JOE B. RITCHEY,

Petitioner,

v.

THE UPJOHN COMPANY AND WILLIAM DEMENT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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19PP

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to consider whether the one-year limit on removal under the second paragraph of 28 U.S.C. § 1446(b) – for cases not initially removable – also applies to the first paragraph of Section 1446(b), when the only two federal circuit courts to have addressed the question have each unanimously concluded that it does not.

2. Whether this Court should grant certiorari to consider the Ninth Circuit's application of California civil procedure and statute of limitations law in deciding, based on the particular procedural history and facts of this case, that petitioner fraudulently joined nondiverse parties against whom he had no possibility of prevailing in an effort to defeat diversity jurisdiction.

CORPORATE DISCLOSURE STATEMENT

The Upjohn Company makes the following disclosure pursuant to Supreme Court Rule 29.6:

On November 2, 1995, a merger took place between The Upjohn Company and Pharmacia AB. In June of 1996, the name of The Upjohn Company was changed to Pharmacia & Upjohn Company which remains incorporated in the State of Delaware. Pharmacia & Upjohn Company is the wholly owned subsidiary of Pharmacia & Upjohn, Inc., which is a publicly owned corporation also incorporated in Delaware. There are no nonwholly-owned subsidiaries.

Stanford Health Services makes the following disclosure pursuant to Supreme Court Rule 29.6:

Stanford Health Services is not a publicly owned corporation or a subsidiary or affiliate of a publicly owned corporation, and has issued no shares to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

STATEMENT OF THE CASE 1

I. FACTS AND PROCEDURAL HISTORY 1

THE PETITION SHOULD BE DENIED 4

I. THE ONE-YEAR REMOVAL ISSUE DOES NOT WARRANT REVIEW 4

A. THERE IS NO CONFLICT AMONG THE CIRCUITS 5

B. THE NINTH CIRCUIT'S DECISION WAS CORRECT 6

II. THE FRAUDULENT JOINDER ISSUE DOES NOT WARRANT REVIEW 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Federal Cases

Emrich v. Touche Ross & Co., 846 F.2d 1190 (9th Cir. 1988) 12

Farios v. Bexar County Board of Trustees, 925 F.2d 866 (5th Cir. 1991) 12

Greer v. Skilcraft, 704 F. Supp. 1570 (N.D. Ala. 1989) 10

Leininger v. Leininger, 705 F.2d 727 (5th Cir. 1983) 3

Lewis v. Time, Inc., 83 F.R.D. 455 (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983), *overruled on other grounds by Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990) 12

Loftin v. Rush, 767 F.2d 800 (11th Cir. 1985) 3

New York Life Insurance Co. v. Deshotel, 142 F.3d 873 (5th Cir. 1998) 5, 6

Powers v. Chesapeake & Ohio Railway Co., 169 U.S. 92 (1898) 9, 10

Saunders v. Wire Rope Corp., 777 F. Supp. 1281 (E.D.Va. 1991) 9, 10

Zogbi v. Federated Department Store, 767 F. Supp. 1037 (C.D. Cal. 1991) 7, 8

Federal Statutes

28 U.S.C. § 1446(b) ..... *passim*

28 U.S.C. § 1446(b)(2) 8

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

H.R.Rep. No. 889, 100th Cong., 2d Sess. 71-73 reprinted in 1988 U.S. Cong. & Admin. News 5982 9

14A Wright, Miller & Cooper, Federal Practice and Procedure § 3732 at 530 .....3, 6

Supreme Court Rule 29.6 ii

STATEMENT OF THE CASE

I. FACTS AND PROCEDURAL HISTORY

Petitioner Joe B. Ritchey is a lawyer. In May 1984 he was arrested for bribing a witness in a criminal prosecution. This resulted in convictions on two felony counts in September 1986. His license to practice law was revoked.

After his convictions, Ritchey began working with a criminal appellate specialist to develop grounds for a new trial and an appeal. They began searching for excuses to explain away Ritchey's criminal conduct. In December 1986 Ritchey filed a motion for a new trial which blamed Halcion®, a prescription medication Ritchey was taking at the time he sought to corrupt the State's prosecution. The motion was denied. Ritchey was sentenced to jail and was fined. The California Court of Appeal affirmed one felony conviction and reversed the other (the reversal had nothing to do with Halcion®; Ritchey's statement in the Petition to the contrary is flatly wrong). Ritchey's license to practice law ultimately was reinstated, seven years after he was arrested.

On March 12, 1990 Ritchey filed a lawsuit against The Upjohn Company, the manufacturer of Halcion®, in the United States District Court for the Northern District of California (*Ritchey I*). That action sought compensatory and punitive damages, under a variety of theories, arising out of his use of Halcion® and his criminal conduct. After substantial discovery, briefing, and argument, the District Court found that Ritchey possessed knowledge in August 1988 – at the time he was preparing the appeal from his criminal conviction in which he argued that Halcion® caused his criminal conduct – sufficient, under

California law, to trigger the running of California's one-year statute of limitations. As Ritchey's complaint was not filed until nearly two years after he obtained the requisite knowledge, the District Court entered judgment in favor of Upjohn on November 1, 1993. Ritchey moved for reconsideration; the motion was denied.

After the District Court denied Ritchey's motion for reconsideration, Ritchey secretly filed another action against Upjohn in a California state court (*Ritchey II*) on January 3, 1994. *Ritchey II* alleged ***exactly*** the same injury, the same damages, and the same claims alleged in *Ritchey I*. The ***only*** change was the naming of a non-diverse defendant – the "co-conspirator" physician who is alleged to have participated in the approval process for Halcion®.[1]

Ritchey did not serve *Ritchey II*. He let it sit – undiscovered by Upjohn – while he pursued an appeal of the dismissal of *Ritchey I* in the Ninth Circuit. The Ninth Circuit affirmed the dismissal of *Ritchey I* on June 8, 1995, and subsequently denied Ritchey's petition for rehearing.

On December 29, 1995, just after the Ninth Circuit denied further review, following a second motion for reconsideration, Ritchey mailed the complaint in *Ritchey II* to Upjohn (he personally served the physician the same day). Upjohn received the complaint on January 9, 1996.

---

[1] Stanford Health Services was not named in the complaint but purportedly was later substituted and served as a "Doe" defendant. Although Stanford was never properly served, it appeared voluntarily.

Upjohn removed *Ritchey II* to the United States District Court on January 29, 1996, twenty days after receiving the initial pleading.[2] At the same time, Upjohn moved to dismiss based upon the previously-adjudicated fact that Ritchey's claims were barred by the statute of limitations.

Rather than respond to the motion to dismiss, Ritchey moved to remand *Ritchey II* to state court on the ground that there was no diversity of citizenship. Upjohn opposed, demonstrating that the physician was a fraudulently-joined defendant because Ritchey's claim against him was barred – as a matter of law – by the California statute of limitation under the District Court's rulings in *Ritchey I*.

---

[2] Petitioner's claim (Pet. 4 & n.1) that the notice of removal was not filed until "33 days after receipt by agents of Upjohn" is unsupported and unfounded. In any event, as the Court of Appeals held, Pet. App. 3 & n.3, petitioner waived any objection on this ground by failing to properly raise it both in the District Court and the Court of Appeals. Petitioner asserts without citation that failure to file the petition for removal within 30 days is a nonwaivable jurisdictional defect, but he is wrong. *See, e.g., Loftin v. Rush*, 767 F.2d 800, 805 (11th Cir. 1985) ("The time limitations for removal is not jurisdictional . . . and may be waived."); *Leininger v. Leininger*, 705 F.2d 727, 729 (5th Cir. 1983) (same). Moreover, "the time limits will be ignored when removal is sought on the ground that some defendants have been fraudulently joined to prevent removal." 14A Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 3732 at 530. Although petitioner attempts to raise this issue in the body of his petition, it is not included in the Questions Presented, and petitioner has made no effort whatever to argue that it is certworthy.

The District Court denied Ritchey's motion to remand and granted Upjohn's motion to dismiss, holding that (1) Upjohn's removal was timely, and (2) the doctrines of *res judicata* and collateral estoppel barred Ritchey's attempt to relitigate the statute of limitations issue. The Ninth Circuit affirmed on April 3, 1998, and denied Ritchey's petition for rehearing on May 27, 1998.

This petition for a writ of certiorari followed.

THE PETITION SHOULD BE DENIED

I. THE ONE-YEAR REMOVAL ISSUE DOES NOT WARRANT REVIEW

Ritchey's first issue argues that 28 U.S.C. § 1446(b) absolutely prohibits removal of an action on diversity grounds more than one year after a complaint is filed, even if the plaintiff has not revealed the existence of the lawsuit to any other party, and has not served the complaint on any defendant. Under Ritchey's theory, a plaintiff can unilaterally prevent removal of an otherwise properly removable case through stealth and patience. Thus, in this case Ritchey argues that notwithstanding (1) his concealment of the filing of *Ritchey II* from Upjohn for more than ***two years*** and (2) Upjohn's removal of *Ritchey II* just twenty days after receiving the complaint, the removal was barred by Section 1446(b).

Petitioner's request that the Court consider this issue should be denied for two reasons. First, there is no conflict among the circuits. Second, the Ninth Circuit's ruling was plainly correct.

A. THERE IS NO CONFLICT AMONG THE CIRCUITS

As discussed below, 28 U.S.C. § 1446(b) provides that an action may be removed (1) within thirty days after defendant receives the complaint, or (2) if the complaint is not removable upon receipt, within thirty days after the complaint becomes removable so long as this occurs within one year of the filing of the complaint.

The Ninth Circuit ruled that the plain meaning of Section 1446(b) is that the one-year limitation period applies only to the second circumstance; it does not apply to a case – such as this one – where the defendant is entirely unaware of the existence of the lawsuit (much less has the defendant received the complaint) for more than a year after the action was filed. The Ninth Circuit rejected Ritchey's contorted effort to read Section 1446(b) to impose an absolute one-year limit to removal, regardless of whether plaintiff has actively concealed the existence of the action from the defendants. (Pet. for Cert., App. 6-8.)

The only other circuit court to squarely address this issue is the Fifth Circuit. See *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873 (5th Cir. 1998). The Fifth Circuit's analysis is entirely consistent with the Ninth Circuit's analysis here:

> When read in its entirety with these [statutory construction] precepts in mind, Section 1446 requires that we interpret the one-year limitation on diversity removals as applying only to the second paragraph of that section, i.e., only to cases that are not initially removable. . . . Courts applying the one-year limitation to the first

> paragraph can do so only by distorting its ordinary meaning.

(*Id.* at 886.)

Both the court below and the Fifth Circuit in *Deshotel* recognized that some district courts had done just that and had reached results inconsistent with their holdings. The two appellate court decisions, however, largely resolved the confusion among the district courts: every one of the conflicting district court decisions cited by the Fifth Circuit in *Deshotel* was from either the Ninth or Fifth Circuits, and accordingly is no longer good law, given the circuit court decisions. Similarly, six of the seven conflicting decisions cited by the court below (Pet. App. 9) were from within the Ninth Circuit, and thus have been superseded by the decision in this case. Whatever conflict had existed among the district courts has thus been largely dissipated by uniform court of appeals decisions; there is no need for intervention by this Court.[3]

B. THE NINTH CIRCUIT'S DECISION WAS CORRECT

The removal statute, 28 U.S.C. § 1446(b), provides:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or

---

[3] The commentators are also in agreement with the uniform position of the circuit courts. *See, e.g.*, 14A Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 3732, at 284 (Supp. 1997).

> otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 [diversity] of this title more than 1 year after commencement of the action.

The Ninth Circuit adopted the analysis of *Zogbi v. Federated Dept. Store*, 767 F.Supp. 1037 (C.D. Cal. 1991). In *Zogbi*, the plaintiff filed suit in California state court, but waited almost three years before serving two California defendants. A Delaware defendant, although not served, received a copy of the complaint at the same time and promptly removed the case to federal court on the basis of diversity jurisdiction. The plaintiff attacked the removal as improper because it was taken more than one year after its commencement. The *Zogbi* court held that the California defendants were fraudulently joined and that removal was timely. *Id.* at 1042.

Zogbi applied basic principles of statutory construction, holding that "the one year limitation in section 1446(b) only applies to cases removed on the basis of something other than the initial pleading." *Id.* at 1040.

The court reasoned that "[t]he 'except that . . . ' clause cannot reasonably be read as also modifying the first sentence/paragraph of section 1446(b)." *Id.* at 1039.

The court further reasoned that if Congress had intended to prevent removal in all diversity cases commenced more than one year prior to removal, it could easily have worded the statute to accomplish that result. *Id.* "For example, Congress could have placed the 'except that . . . ' clause at the end of the first paragraph of section 1446(b) as well as at the end of the second paragraph." *Id.* at 1040 n.4. In addition, the court noted that "[t]he rubric of strict construction of removal statutes is not carte blanche for disregarding the language and structure of the statute at issue." The court cautioned against finding "loopholes" to avoid federal jurisdiction where such loopholes are not justified by the language of the statute. *Id.* at 1040.

The *Zogbi* court also considered the legislative history of § 1446(b), finding that "Congress was concerned with removal of cases commenced in state courts that had progressed towards trial. . . . Thus, where developments in a non-removable case render it removable, Congress has determined that such a case should not be removed more than one year after its commencement." *Id.* (citation omitted). As the legislative history of § 1446(b) states:

> Subsection (b)(2) amends 28 U.S.C. § 1446(b) to establish a one-year limit on removal based on diversity jurisdiction as a means of reducing the opportunity for removal after substantial progress has been made in state court. The result is a modest curtailment in access to diversity jurisdiction. The amendment addresses problems

> that arise from a change of parties as an action progresses toward trial in state court. . . . Removal late in the proceedings may result in substantial delay and disruption.

H.R.Rep. No. 889, 100th Cong., 2d Sess. 71-73 reprinted in 1988 U.S. Cong. & Admin. News 5982, 6031-6034.

Zogbi is consistent with this Court's holding in *Powers v. Chesapeake & Ohio Railway Co.*, 169 U.S. 92 (1898). There, the Court discussed the importance of a nonresident's right of removal, making clear that artful maneuvering and abuse of procedural rules should not be permitted to abridge that right. In permitting the defendant to file an untimely petition for removal, the Court held:

> The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond [defendant's] control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right. . . .

Id. at 100-101.

Citing the *Powers* decision, among others, the court in *Saunders v. Wire Rope Corp.*, 777 F.Supp. 1281, 1284-85 (E.D.Va. 1991), read section 1446(b) in a manner consistent with its plain language and intent – it held that the one year bar applied "only in cases where substantial progress has been made in state court" such that removal would delay the case and erase progress. The court noted that the right to removal is a "substantial right of the

non-resident defendant," which a court should not permit crafty tactics to deprive or abridge. *Id.* at 1284 (citing *Heniford v. American Motors*, 471 F.Supp. 328, 335 (D.S.C. 1979) (removal of case permitted after plaintiff craftily delayed dismissal of non diverse defendant until closing argument in an attempt to deprive nonresident defendant of right to removal)).

The *Saunders* court noted that any other holding would do violence to section 1446(b), undermine congressional intent, and fly in the face of *Powers*, stating that

> . . . removal in the present case should be upheld. Otherwise, the plaintiffs, by failing to serve the defendants and hereby move the case along, have earned the distinction of having devised a game plan for circumventing removal. A resident plaintiff, who desires to pin down a nonresident corporate defendant in state court, merely must delay service of process . . . until nearly a year has expired. In such manner, the nonresident defendant be totally deprived of its historical right to removal, although no substantial progress in state court has been made.

Id.

Similarly, in *Greer v. Skilcraft*, 704 F.Supp. 1570, 1582 (N.D. Ala. 1989), the court held:

> The one year bar added to the end of the second paragraph of § 1446(b) . . . applies whenever the second paragraph of § 1446(b) is triggered; *i.e.*, 'if the case stated by the initial pleading is not removable.' In short, the second paragraph of amended § 1446(b) provides that for cases not removable on the basis of the initial complaint there are two separate and independent time

> limits: (1) the Notice of Removal must be filed within 30 days from the receipt of a jurisdiction-creating document in the case; and (2) if removal is based on diversity of citizenship, the Notice of Removal must also be filed within one year from the commencement of the action.

By adding the one-year limit to the second paragraph of section 1446(b), Congress intended only a "modest curtailment" in access to federal courts on the basis of diversity jurisdiction – it certainly did not mean to create a loophole that would swallow the rule, allowing plaintiffs to use procedural games to deprive diverse defendants of a substantial and historical right. The plain language of section 1446(b) and the intent of Congress require application of the one-year limit only to those cases in which the initial pleading is not removable. Application of the one-year limit to the first paragraph of section 1446(b), where it does not appear, would encourage plaintiffs to follow Ritchey's lead and delay service to improperly prevent removal on the basis of diversity jurisdiction.

II. THE FRAUDULENT JOINDER ISSUE DOES NOT WARRANT REVIEW

The second and third issues that petitioner asks the Court to review are really the same question: Did the District Court and the Ninth Circuit err in determining that the non-diverse defendants were sham defendants?

This is not a question that warrants the Court's attention. This is a mixed question of fact and California law,

and does not – despite petitioner's hyperbolic rhetoric – implicate any concern of constitutional dimension.

A sham defendant – one who has been joined for the purpose of defeating diversity jurisdiction – may be ignored for the purpose of determining jurisdiction. *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1193 (9th Cir. 1988). A defendant is a sham defendant if the plaintiff cannot establish liability against the party in question. *Farios v. Bexar County Bd. of Trustees*, 925 F.2d 866, 871 (5th Cir. 1991); *Lewis v. Time, Inc.*, 83 F.R.D. 455 (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983), *overruled on other grounds by Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990).

Here, the District Court and the Ninth Circuit ruled that (1) the court had conclusively established the date which began the running of the statute of limitations under California law as to Ritchey in *Ritchey I*; (2) that ruling is binding upon Ritchey in *Ritchey II* (Pet. for Cert., App. 15); (3) under California statute of limitations law, Ritchey's claims against the non-diverse defendants were barred as a matter of law (*id.* at 15-17); therefore, (4) the non-diverse defendants were sham defendants whose presence could not defeat diversity jurisdiction.

Ritchey utterly fails to demonstrate that the Ninth Circuit's ruling raises any issue worthy of review. In none of the cases cited by Ritchey had the federal trial court ***previously*** and ***conclusively*** decided the threshold question in another case involving identical parties and claims – here, the running of statute of limitations – which established beyond question that the non-diverse defendants were sham defendants as a matter of law. This finding did not require the trial court to engage in a

"summary-judgment-type proceeding"; as the Ninth Circuit made plain, fraudulent joinder was clear from the face of the complaint and the Ninth Circuit's previous rulings. (Pet. for Cert., App. 15-17.)

Ritchey's real quarrel is with the Ninth Circuit's analysis of California statute of limitations and civil procedure law, and the application of that law to the unusual facts of this case. This Court need not and should not consider those state-law and fact-bound questions.

CONCLUSION

The petition for certiorari should be denied.

DATED: September 23, 1998

Respectfully submitted,

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In The
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October Term, 1998

Joe B. Ritchey,

Petitioner,

v.

The Upjohn Company and William Dement,

Respondents.

On Petition For Writ Of Certiorari To The
United States Court of Appeals for the Ninth Circuit

MEMORANDUM REPLY TO RESPONDENTS ' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S MEMORANDUM REPLY TO RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents' consolidated joint opposition to certiorari offered up to the Court with seemingly little force and conviction simplistically characterizes the Ninth Circuit's decision as nothing more than the mere "application of [California] law to the unusual facts of this case" attempts to mask the importance of the grant of review in this case.

1. As the Court knows, the Ninth Circuit comprises 15 separate judicial districts in which the ***Ritchey*** rule now requires the district courts to conduct full and expanded plenary review of the merits of all diversity removal petitions seeking remand on nothing more then the mere allegation of fraudulent joinder of non-diverse state defendants in state court even though more than one year has passed since the action was commenced in state court.

The ***Ritchey*** rule, by authorizing the piercing of a state court plaintiff's pleadings to reach the full merits of the state court claims against the state resident defendants, also allows federal courts to enter orders of involuntary dismissal against all state resident defendants, by invoking not narrow but full subject matter juridiction of the case in its entirety by improperly adjudicating all claims as to all parties.

This remarkable holding is contrary to the most reasonable interpretation of 28 U.S.C. §1446(b) and the legislative history accompanying the 1988 amendments to the Act in which the initial pleading in state court appears on the face of the complaint alleges causes of action against state resident defendants, when involuntary orders of dismissal of the state resident defendants, could and should be entered by the state court in the first instance, where upon any remaining diverse defendants could then seek removal, so long as the one year time limit mandated by Congress has not yet expired. The legislative history of the 1988 amendments supports this view and is fraught in the congressional deliberations acknowledging that the one year time limit might well be

manipulated through fraudulent joinder by plaintiffs forum shopping to secure some perceived tactical advantage. The Ninth Circuit's result is in direct conflict with the intent of Congress and the underlining policies and purposes of the Act.

By holding that fraudulent joinder diversity removal petitions fall under the first paragraph and not the second paragraph of 28 U.S.C. §1446 (b), the Ninth Circuit has effectively ruled that no other time limit other than the 30 day limit in the first paragraph applies to diversity removal based on fraudulent joinder claims, no matter how much progress has been made in state court, and regardless of how much time has passed since commencement of the action in state court, a diverse defendant, within 30 days after service in state court, may simply allege fraudulent joinder and remove more than one year after the case commenced in state court. This result was not and could not have been intended by Congress when it enacted the 1988 amendments to rhe Act.

Instead of the expansionist interpretation by the Ninth Circuit, which increases the already ever burgeoning case load of the federal judiciary, it is much more likely then not that the 100th Congress intended the more reasonable and likely construction that diminishes the federal court burden --- that all state court complaints, which on their face clearly lack complete diversity of citizenship of the parties, remain in state court until some state court event results in "receipt by the [remaining complete diverse] defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper ..." upon which a claim of complete diversity removal could then be bottomed, and then *only* if that jurisdictional event ensues in state court within the one year time limit imposed by Congress in the 1988 amendments to the Act. Petitioner's interpretation of 28 U.S.C. § 1446(b) as amended clearly comports with the unambigous desire by the l00th Congress to abolish diversity removal altogether by recognition that state courts are far better suited to adjudicate issues of fraudulent joinder since, such a claim in state court would be adjudicated in

due course only after factual and legal determinations are advanced by the parties following discovery on the basis of state procedural and substantive law.

The ***Ritchey*** rule is thus contrary to the more sound and reasoned interpretation of the 1988 amendments to the Act, when the legislative history is taken into account, which curiouly the Ninth Circuit refused to even examine, weigh or consider, along with the thoughtful jurisprudence developed by the overwhelming number of district court opinions[1], which now exceed more than thirty-five in number regarding remand orders beyond the one year limitation, which are final yet unreviewable by express Act of Congress under 28 U.S.C § 1447(d). Because district court remand orders to state court cannot not be appealed, the likelihood of a clear resolution of the one year time limitation on diversity removal based upon claims of fraudulent joinder may evade judicial review in other circuits for some time to come, as has been the case since Congress debated complete elimination of diversity jurisdiction altogether more than ten years ago which resulted in the 1988 amendments, a legislative outcome reflecting a compromise between Senate and House conferees which avoided and perhaps delayed for another day the possible outright abolition of diversity jurisdiction.

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1. As noted in our petition at page 11 the Court in ***Caterpillar, Inc. v. Lewis***, 519 U.S. 61,117 S.Ct. 467,473 (1996), *which the respondents so conveniently ignore* in their joint brief in opposition, while the Third and Eleventh Circuits in ***Singh v. Daimler-Benz***, 9 F.3rd 303, 309 (3rd Cir.1993) and ***In re Uniroyal Goodrich Tire Co.***, 104 F.3d 322, 323(11th Cir.1997) have rightfully assumed without analysis the one year rule on diversity removal is absolute. See Givens, *Manual of Federal Practice*, 5th Ed. (Lexis Law Publishing 1998), Diversity Removal, page 257, concludes as well. However, ***New York Life Insurance Co. v. Deshotel,*** 142 F.3d 873 (5th Cir.1998) decided on June 1, 1998 is in accord with ***Ritchey***.

Review by this Court is necessary to resolve the continued judicial uncertainty and confusion regarding what Congress actually intended in 1988 when it amended 28 U.S.C. § 1446(b) by adding the one-year limitation period on diversity removal.

2. Review by this Court is appropriate for another equally compelling reason. The Ninth Circuit, in authorizing federal court involuntary dismissal in diversity removal cases based on a claim of fraudulent joinder has done extreme violence to the underlying principles of federalism by impermissibly divesting the rights of the sovereign state courts to adjudicate the application of their own rules regarding statute of limitations, issue and claim preclusion, fraudulent concealment, deceit, mispresentation and other conspiracies undertaken by jointly liable tortfeasors, claims that by the very nature of the factual elements alleged ordinarily toll the statute of limitations and would not, as new and independent actions arising under state substantive law be subject to dismissal on the basis of issue or claim preclusion.

Under Article III of the United States Constitution, a state court original pleading which properly alleges valid causes action against non diverse defendants arising under state substantive law, one that is presented in good faith and that asserts viable new causes of action and colorable non-frivoulous claims arising under state law on the face of the complaint, should preclude immediate removal in the first instance *until* the state court determines that the defenses of the statute of limitations or claim and issue preclusion should be sustained in favor of the non diverse defendants. This procedural approach and sequence of adjudication is entirely consistent with the views of the Judicial Conference of the United States Courts as expressed in a 1995 report:

Given the difficulties federal judges frequently encounter in

> predicting state substantive law and the unavoidable intrusion of the federal courts in this lawmaking function of the state courts, theoretical justifications for diversity jurisdiction are extremely weak in comparison to other areas of federal court activity.

"Long Range Plan for Federal Courts" at page 31.

In sum, given the weighty policy considerations confronted by the 100th Congress when it pondered and adopted the more restrictive 1988 amendments to 28 U.S.C. § 1446(b), a federal court should, when faced between two apparently reasoned interpretations of a diversity removal statute, where one statutory construction lessens the burden of the exponential increase in diversity case loads while at the same time yielding back sovereignty to the state courts to apply its own substantive state law, the federal courts should choose the interpretation that confines diversity removal and federal jurisdiction narrowly, and factors and results in an appropriate deference to states rights underlying "our federalism".

For the foregoing reasons and for the reasons stated in the petition for writ of certiorari, the Court should grant review on the important questions presented herein which affect the very fabric of the federal judiciary and its relationship to state court sovereignty.

Respectfully submitted,

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